THE INSTITUTES

OF

JUSTINIAN

WITH

ENGLISH INTRODUCTION, TRANSLATION, AND NOTES

BY THE LATE

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PREFACE

TO

THE SEVENTH EDITION.

THIS EDITION of the 'Institutes' has been carefully revised and corrected, but scarcely any additions have been made beyond that of giving at the end of the Introduction a chronological list of the chief laws and legal changes noticed in the 'Institutes'.

The object of the work is to aid those who desire to use the 'Institutes' as an introduction to the study of Roman law, or who wish to find in one volume the means of gaining a general acquaintance with the history, principles, and contents of Roman law.

In the Introduction I have endeavoured to give such a general sketch of Roman law and its history as will prepare readers for the details of the work itself. The translation aims at rendering the text in language intelligible to those who have not, as well as to those who have, a long acquaintance with Latin. The notes are intended to embody such information as is necessary to elucidate the text, or to give the results of successive legal changes. In the Summary at the end of the volume I have attempted to arrange in a methodical form the principal contents of the text and the notes.

The value of the 'Institutes' is that of an elementary work, and the value of an elementary work is destroyed if it is made too long and difficult. I have, therefore,

avoided controverted points of law and history as much as possible, and where it was not possible to avoid them, I have stated what seemed to me the soundest conclusion, without attempting to defend it.

The original edition was in the main founded on the works of Ortolan, Ducaurroy, and Puchta. In subsequent editions I was greatly aided by the elaborate commentaries of Demangeat, to which those who wish to find in the 'Institutes' something more than an elementary work may be confidently referred. Lastly, I have derived assistance, which it is impossible to acknowledge too freely, from Mr. Poste's learned edition of 'Gaius,' and from Mr. Hunter's admirable and exhaustive work on 'Roman Law'; while in revising the translation, I have had the great advantage of consulting the careful and accurate translation of Messrs. Abdy and Walker.

The text adopted is, with few variations, that of Huschke (Leipzig, 1868).

INTRODUCTION.

1. THE legislation of Justinian belongs to the latest period of the history of Roman law. During the long space of preceding centuries the law had undergone as many changes as the State itself. The Institutes of Justinian embody principles and ideas of law which had been the slow growth of ages, and which, dating their origin back to the first beginning of the Roman people, had been only gradually unfolded, modified, and matured. It is as impossible to understand the Institutes, without having a slight knowledge of the position the work occupies in the history of Roman law, as it is to understand the history of the Eastern Empire without having studied that of the Western Empire and of the Republic. Many, also, of the leading principles of Roman law contained in the Institutes are unfamiliar to the English reader, and though they may be learned by a perusal of the work itself, the reader, to whom the subject is new, may be glad to anticipate the study of details by having placed before him a general sketch of the part of law on which he is about to enter. It is proposed, therefore, in this Introduction, to give first an outline of the history of Roman law, and then an outline of Roman private law. Each, however, will only be given with the very moderate degree of fulness proper to a sketch intended to be merely a preliminary to the study of the Institutes.

Object of the Introduction.

HISTORY OF ROMAN LAW.

2. However obscure may be the history of early Rome, we cannot doubt that Roman citizens were, from a very early period, composed of two distinct bodies, the *populus* and the *plebs*, of which the first alone originally possessed all political power, and the members of which

History of early Rome. The Populus.

were bound together by peculiar religious ties. Nor can we have any reasonable doubt about the general features of the constitution of the *populus*. Whatever may have been their origin, it consisted of three tribes. Each tribe was divided into ten *curiæ*, and each *curia* into ten *decuriæ;* another name for a *decuria* was a *gens*, and it included a great number of distinct families, united by having common sacred rites, and bearing a common name. In theory, at least, the members of the same *gens* were descended from a common ancestor, and the families of the *gens* were subdivisions of the same ancestral stock, but both individuals and groups were occasionally admitted from outside. A pure unspotted pedigree was claimed by every member of a *gens*,* and there was a theoretical equality among all the members of the whole tribe. The heads of the different families in these *gentes* met together in a great council, called the council of the curies (*comitia curiata*). A smaller body of three hundred, answering in number to the *gentes* in each of the three tribes, and called the Senate, was charged with the office of initiating the more important questions submitted to the great council; and a king, nominated by the senate, but chosen by the curies,† presided over the whole body, and was charged with the functions of executive government.

Religious System.

3. The *populus* was also bound together by strong religious ties. The religion of Rome was intimately connected with the civil polity. The heads of religion were not a priestly caste, but were citizens, in all other respects like their fellows, except that they were invested with peculiar sacred offices. The king was at the head of the religious body; and beneath him were augurs and other functionaries of the ceremonies of religion. The whole body of the *populus* had a place in the religious system of the State. The mere fact of birth in one of the *familiæ* forming part of a *gens* gave admittance to a sacred circle which was closed to all besides. Those in this circle were surrounded by religious ceremonies from their cradle to their grave. Every important act of their life was sanctioned by solemn rites. Every division and subdivision of the State to which they belonged had

* *Gentiles sunt, qui inter se eodem nomine sunt; non est satis: qui ab ingenuis oriundi sunt; ne id quidem satis est: quorum majorum nemo servitutem servivit: abest etiam nunc: qui capite non sunt deminuti.*—CICERO, *Topic.* 6.

† *Quirites, regem create; ita Patribus visum est.*—LIV. i. 17. Mommsen argues from the analogy of the mode in which the magistrates who replaced the king were appointed, that the king must have been nominated by his predecessor (*Hist. Rome*, Dickson's Trans., i. 65).

its own peculiar sacred ceremonies. The individual, the family, the *gens*, were all under the guardianship of their respective tutelary deities. Every locality with which they were familiar was sacred to some patron god. The calendar was marked out by the services of religion; the pleasure of the gods arranged the times of business and leisure; and a constantly superintending Providence watched over the councils of the State, and showed, by signs which the wise could understand, approval of, or displeasure at, all that was undertaken.

The Plebs.

4. By the side of this associated body there was another element of the State, occupying a position very different from that which was occupied by this privileged community. The *plebs* was probably formed by the inhabitants of conquered towns being brought to Rome, by the influx of voluntary settlers, and by freedom being accorded to slaves.* The plebeians were in a position of dependence on the king or on members of the *populus*, and were, as strangers, outside the political circle of members of the *gentes*. They belonged to no *gens*, had no place in the *comitia*, no share in the legislative or executive government; as little had they any share in the *jus sacrum*. They were as much excluded from the pale of the peculiar divine law as from that of the peculiar public law of the ruling body. Even the Servian constitution, and the formation of the thirty local tribes, laid the foundation of future change, rather than altered in early times the basis on which existing institutions were founded. The centuries opened to the *plebs* a door to political power by making the two orders meet on the common ground of a graduated scale of property; and the constitution of the thirty tribes marked off the inhabitants of the town and country into small local divisions, in the *comitia* of which the *plebs* had of course the preponderance, if it is to be supposed that the tribes had any recognised *comitia* before the institution of tribunes at the beginning of the Republican period. But though the *comitia centuriata* took away ultimately almost all political power from the *comitia curiata*, still the old relations of the different members of the body politic remained, in theory at least, long unimpaired. The curies alone could give the religious sanction which was indispensable to the validity of the resolutions of the centuries, and the *plebs* was as much as ever excluded from admission into the body of the *popu-*

* Mommsen considers that the plebeians were simply the *clientes*, looked at as deprived of political rights (*Hist. Rome*, Dickson's Trans., i. 90).

lus, fenced round with its impassable wall of religious privileges, although the *plebs* and the *populus* were governed for the most part by the same rules of private law.

Legislation in early Rome.

5. There could be very little direct law-making, except to meet temporary emergencies, in such a community as early Rome. What laws were made, were first proposed, arranged, and determined on by the Senate, under the guidance of its chief magistrate, the king, and then submitted to the highest source of power, the *comitia curiata*. After the institution of the centuries, the *comitia centuriata* gradually succeeded to the political power of the *curiata*, and the curies only met to give a formal religious sanction to the resolutions of the centuries. The king published regulations on matters that fell exclusively within his province as *pontifex maximus*, and a collection of these *leges regiæ*, which were probably nothing more than by-laws for the conduct of religious ceremonies, was made, or said to be made, by Papirius, who lived in the time of Tarquinius Superbus.*

Judges.

6. The king was the supreme judge in all cases. But if, in a criminal trial, the accused was a member of the *populus*, he could appeal from the king to the *comitia curiata*. If the accused was a plebeian, he had no tribunal to which he could appeal, until, shortly after the expulsion of the kings, the Valerian laws (B.C. 508) transferred appeals to the *comitia centuriata*, of which the *plebs* formed a part. Civil causes were decided by the king in his quality of *pontifex maximus* or by the subordinate *pontifices* acting under him, as all the private law of the *populus* was so mixed up with the sacred law, that it was part of the duty of a *pontifex* to know and guard its provisions.†

Position of the Plebs after the expulsion of the Kings.

7. After the expulsion of the kings the plebeians were admitted to the *comitia curiata* and the Senate, and were allowed, within limits which practically were very narrow, to form *gentes* of their own.‡ But the old antagonism remained, and the struggle between the *plebs* and the *populus* became gradually more and more serious. Besides the right of appeal to the centuries secured by the *lex*

* There is no reason to doubt that Papirius was a real person (DIONYS. ii. 36). But when Pomponius speaks of his collection as the *jus civile Papirianum* (D. i. 2. 2. 2), he probably uses the term not with reference to the real work of Papirius, but to a work composed towards the end of the republic by Granius Flaccus, *De Jure Papiriano* (D. l. 16. 144).

† D. i. 2. 2. 6.

‡ Mommsen, *Hist. Rome* (Dickson's Trans.), i. 267.

Valeria in every case when a citizen was condemned to death, the secession to the Aventine in B.C. 493 wrung from the *patres* the extinction of existing debts, and the creation of tribunes, at first two in number, then five, and afterwards ten, to defend the *plebs*. These champions of the lower order of the State gave great additional importance and a new character, or perhaps a beginning, to the *comitia tributa*, which now had to elect magistrates, who were protected themselves by a sacred character, and were specially commissioned to maintain the interest of their fellow-tribesmen. But the *plebs* had to struggle with an evil which no partial remedies could meet. There was no body of laws to which they could appeal in case they were wronged. The whole administration of the laws was in the hands of the patricians, and there was no appeal from the decision of the magistrate except in cases where life was at stake, or unless the injury, inflicted by wilful perversion of the law, was great enough, as in the memorable instance of Virginia, to rouse the wronged to the redress of physical force. Many of the rights which theoretically belonged to the plebeians as having the same private law with the *populus*, were practically denied them. At last, a successful revolution enabled the *plebs* to insist on a changed form of political government, which might open the door of power and office to the members of their own body, and supply a machinery for the preparation of a fixed and permanent body of law. The Decemvirate, superseding and incorporating into itself every other magistracy, and composed of an equal number of patricians and plebeians, was formed (B.C. 451) for the purpose of collecting and embodying in the shape of written law all those portions of the customary law which it was most essential for the due administration of justice to place on an indisputable footing, and publish for the benefit of the whole body of citizens.

The Twelve Tables. B.C. 450.

8. The lavish praises bestowed on the laws of the Twelve Tables by the later writers of Rome, and the story of the deputation sent to learn the laws of Greece, would give us an idea of a very different body of laws from that which these Tables actually presented. We should expect to find a systematic exposition of Roman public and private law as it existed in the times previous to the Gallic invasion; and to find, also, that the whole body of law was at least coloured by the infusion of a foreign element. We should naturally think that there was something new and original in a legislation which

Cicero considers as almost the perfection of human wisdom.* The fragments of the Twelve Tables which remain to us show how erroneous are these conceptions of their contents. There is nothing whatsoever which we can decidedly pronounce to be borrowed from a foreign origin, except possibly some provisions respecting the law of funerals, taken from the laws of Solon. These Tables contained, for the most part, short enunciations of those points of law which the conduct of the affairs of daily life required to be settled and publicly announced. The law had existed before, but in a floating, vague, traditionary shape, only some very few laws having been engraved on tablets and publicly displayed. The Twelve Tables left to the decision of the magistrate, and the interpretation of those skilled in law, the application and exposition of these principles; they also left many parts of the customary law wholly untouched on. But what the exigencies of the time required deciding, they decided; and they laid a firm foundation on which the structure of private law would rest for the future. It is not difficult to understand how this was esteemed so great a gain to the large body of the citizens, that these laws were spoken of by the ancients as the creations of a new legislation.

The following are the chief provisions of the Twelve Tables, so far as they are known.†—1. The First Table related to the proceedings in a civil suit. If the person summoned before the magistrate would not come, he was to be forced to go, but for an old or sick man a beast of burden was to be provided. If the adversaries could agree on the way, they were to be allowed to do so. If not, the statements of both were to be heard before midday in the Comitium or the Forum, and then, after midday, the magistrate was to adjudge the thing, but every process was to be stopped at sunset. 2. The Second Table fixed the amount to be deposited in the action by wager, and provided that the affair might be put off if necessary, as if, among other things, the judge or arbiter appointed by the magistrate was ill; and pointed out how witnesses might be summoned. 3. The Third Table was apparently made in favour of debtors, for though it left them ultimately at the mercy of the creditor, it gave them new means of averting their

* See especially *De Orat.* i. 43, 44.

† This summary is taken from the arrangement of the supposed contents of the Twelve Tables adopted by Ortolan; but in many points, and especially in the assignment to a particular Table of a fragment, this arrangement is necessarily conjectural.

fate. They were to have thirty days before any steps could be taken against them on a debt confessed or decided to be due. They might then be brought before a magistrate, and unless payment was made or a surety (*vindex*) found, the creditor might put them in irons, but not of more than fifteen pounds weight, and must give them a pound of flour a day. This could last for sixty days only, and the debtor had meanwhile to be produced before the magistrate to show he was alive; and notice of the amount of the debt must be given on three market-days by the creditor, so that an opportunity of ransoming the debtor might be given. Then, but not till then, the debtor was at the mercy of the creditor, who could sell him as a slave beyond the Tiber or kill him, and if there were several creditors, they might hew him in pieces, and although any of them took a part of his body larger in proportion than his claim, he was not to be punished. 4. The Fourth Table referred to the father of the family, who was bidden to destroy deformed children, and whose absolute power over the life and liberty of his children was established, while it was provided that if he sold his son three times, the son should be freed from his power. 5. The Fifth Table related to inheritances and tutorships. Women were to be in perpetual tutorship, except the vestal virgins. As a man disposed by testament, so was the law to be; but if he died intestate, and without a *suus heres*, his nearest *agnati*, or, in default of *agnati*, the *gentiles*, were to take. In default of appointment by testament, the *agnati* were to be tutors, and have the custody of madmen who had no curators. 6. The Sixth Table referred to ownership, and provided that the words spoken in the solemn form of transfer, a *nexum* or *mancipium*, should be held binding; that he who denied them should pay double; that two years' possession for immoveables, and one for moveables, should be the time necessary for usucapion, and that a year should suffice for the usucapion of a wife by her husband, unless she absented herself for three consecutive nights in the time; that no one not a Roman citizen should acquire by usucapion; and that materials built into a house should not be reclaimed by their owner, at least until the building was taken or fell down. The property in a thing sold was not to pass to the purchaser until the vendor was satisfied. The fictitious suit for the transfer of property called *in jure cessio*, and mancipation, were confirmed. 7. The Seventh Table contained provisions as to buildings and plots of land, as to the width of way to be left,

as to overhanging trees, and so forth; and in case of disputes as to boundaries, the magistrate was to appoint arbitrators. 8. The Eighth Table dealt with delicts. It prescribed capital punishment for libellous songs and outrages. A limb was to be given for a limb, three hundred *asses* for the breaking of a bone of a free man, and one hundred and fifty for the breaking of a bone of a slave; for an injury or minor outrage, twenty-five *asses;* a four-footed beast doing injury might be given up to whomsoever it injured, in lieu of compensation. The nocturnal devastation of crops or the incendiarism of a building was punished with death. Theft, if the thief was caught red-handed, was to be punished by the thief, if a freeman, being beaten and given over to the person robbed, and, if a slave, by his being beaten and thrown from the Tarpeian Rock; while various other provisions were made as to theft, fixing minor penalties, where the circumstances were not so grave. The rate of interest was fixed at one per cent. per month (*centesimæ usuræ*), and the usurer who exceeded this was to be fined quadruple. The false witness was to be thrown from the Rock, and the witness in a solemn form who refused his testimony was to be infamous; and the enchanter and poisoner were to be punished capitally. 9. The Ninth Table related to public law, and provided that there were to be no *privilegia*, or laws affecting individuals only; that the centuries alone could pronounce capital sentence; that the judge or arbiter taking a bribe should be punishable capitally; that there should be an appeal to the people from every penal sentence; and that death should be the punishment of leaguing with, or handing over a citizen to, the enemy. 10. The Tenth Table related to funerals, limiting the ceremonies and display attending them. 11. The Eleventh Table prohibited the marriage of patricians and plebeians; and 12. The Twelfth Table had reference to some miscellaneous matters; as that a slave who had done an injury might be abandoned to the person injured, in lieu of compensation. The seizure of anything belonging to the debtor (*pignoris capio*) was permitted when the debt had been contracted, or the sum due was to be expended, for sacrificial purposes.

It will be observed that the Twelve Tables recognise four of the actions of law, the nature of which will be noticed in a later part of the Introduction, viz., *sacramentum*, *judicis postulatio* (in the shape of the arbitration to be given to settle boundaries), *manus injectio*, and *pignoris capio*. They further recognise the

distinction between the magistrate and the *judex*, which was the characteristic feature of Roman procedure; and probably these actions of law and this distinction between the judge and the magistrate date from a time much earlier than the Twelve Tables. Most, too, of the characteristic points of Roman civil law are to be found in the Twelve Tables. The *patria potestas*, usucapion, tutelage, testamentary and intestate succession, the *nexum*, *mancipatio*, all are enforced, and evidently formed part of the ancient customary law of Rome.

The attainment of political equality by the Plebs.

9. The Decemvirate was nominally intended to be a means of removing, as far as was then thought possible, the political distinction between the orders. How little the object was really accomplished is notorious. Although half the decemvirs were plebeians, the suppression of the meetings of the *comitia tributa*, and the loss of tribunes, were poorly compensated by the presence of magistrates who acted in conjunction with patricians, and readily yielded deference to their colleagues. Besides, the Two Tables added in the year of the second Decemvirate contained provisions which later writers considered manifestly unjust;* and we have seen that, among other things, they expressly refused the *connubium* to the *plebs*. The Twelve Tables, as fixing and proclaiming the law, were undoubtedly a source of great strength to the plebeians, and enabled them to maintain a much more secure position in their future struggles; but the Decemvirate, regarded as a crisis in their political history, was certainly unfavourable to them. Nothing shows more completely that this was so than the progress they made immediately after the downfall of Appius Claudius and his colleagues. The laws of Horatius and Valerius not only forbad the constitution of any magistracy from which there should be no appeal, but provided that the ordinances of the *comitia tributa* should, if sanctioned by the senate and the curies, be binding on all Roman citizens; and in B.C. 444, only four years after the abolition of the Decemvirate, the Canuleian law gave the *connubium* to the *plebs*, and the marriage of a patrician with a plebeian was no longer forbidden by law. This change was important, not only as removing a distinction mortifying to many individuals and embarrassing many of the relations of private life, but as breaking through one of the barriers which the *jus sacrum* had hitherto

* Cic. *De Rep.* ii. 37

interposed in the way of the *plebs.** The obstacle of a religious disqualification was the reason generally assigned by the *populus* for the exclusion of plebeians from public offices; † and it was a great step towards political equality that the objection urged to marriages between the two orders—that it would disturb the *sacra* of the *gentes*—should be overcome. The advance of the *plebs* to political equality was, however, very slow; and it was not until a century and a half had elapsed from the passing of the Canuleian law that the two orders were placed on an equal footing. We may take the year B.C. 287, the date of the *lex Hortensia*, as the period when we can first pronounce that the distinction of the two orders was really done away. When that law had been passed, the plebeian had a full share in the *jus publicum* and the *jus sacrum*. The ordinances of the *comitia tributa* required no confirmation of the curies, no sanction of the senate; they were binding on the whole Roman people directly they were passed. The equality between the two orders was so complete that the plebeian could become consul, censor, prætor, curule ædile; he could enter the senate, he could administer justice; he was excluded from none of the privileges of the *jus sacrum;* he could become pontifex and augur; and though he could not of course take part in any of the *sacra* belonging to particular *gentes*, go through certain religious ceremonies, or be engaged in the service of particular gods, these exceptions did not lower his political position. As far as the history of law is concerned, we may henceforward lose sight of the distinction between plebeian and patrician.

The jus civile.

10. From the writings of the later jurists, and especially from those of Gaius and Cicero, and from the fragments of the Twelve Tables that have come down to us, we can collect the essential features of the private law of Rome in its earliest period, before a general advance in civilisation had modified it. This early law, which rested on custom as its foundation, and the elements of which, except so far as appeared in the laws of the Twelve Tables, were only known by tradition, was called in subsequent times the *jus civile*, the peculiar law of the Roman State. The history of Roman law is the history of the changes introduced

* *Ideoque decemviros connubium diremisse, ne incerta prole auspicia turbarentur.*—Liv. iv. 6.

† *Interroganti tribuno, cur plebeium consulem fieri non oporteret? . . . respondit, quod nemo plebeius auspicia haberet.*—Liv. iv. 6.

into this law, of the additions made to it, and of the method adopted in the process. The notion of a body of customary law, in part unwritten, which was not abrogated, but was evaded or amplified by persons acting under the ideas of later times, is the notion which, above all others, must be embraced clearly by any one who wishes to understand Roman law. The *jus civile* must always be taken as the starting point, and in tracing the history of the later law we have always to trace how, while the *jus civile* still remained in force, the law was made to suit the requirements of different periods by evading or adding to the *jus civile*. It was only in the later days of the Empire that the *jus civile* began to be swept away. When we come to speak of the contents of Roman private law, we shall have occasion to notice what were the leading features of the *jus civile*. We need not at present do more than say that, when a student of Roman law has made himself acquainted with its elementary doctrines, he will find that the chief of these peculiar principles, dating from an unknown antiquity, and affecting the whole body of later jurisprudence, are those which determine the position of a father of a family, the succession to his estate, and the contracts and actions relating to the chief possessions of an agricultural proprietor.

Conquest of Italy.

11. The conquest of Italy and the gradual spread of Roman conquest materially altered the character of the legal system. A branch of law almost entirely new sprang up, which determined the different relations in which the conquered cities and nations were to stand with reference to Rome itself. As a general rule, and as compared with other nations of antiquity, Rome governed those whom she had vanquished with wisdom and moderation. Particular governors, indeed, abused their power; but the policy of the State was not a severe one, and Rome connected herself with her subject allies by conceding them privileges proportionate to their importance or their services. The *jus Latinum* and the *jus Italicum* are terms familiar to all readers of Roman history. The first expressed that, with various degrees of completeness, the rights of Roman citizenship were accorded to the inhabitants of different towns, some having the *commercium* only, some also the *connubium;* but after the Social War (B.C. 90), the *lex Julia* (B.C. 90) and the *lex Plautia* (B.C. 89) gave the full rights of citizenship to Italy below the Po, and the Italians were distributed among the thirty-five tribes. The *jus Italicum* expressed a certain amount of

municipal independence and exemption from taxation, attached to the different places on which the right was bestowed. The citizens of some particular places in Italy above the Po and in the provinces possessed what was termed *Latinitas*, i.e. the *status* of being a Latin, and those possessing *Latinitas* were termed *Latini coloniarii*. They had the *commercium*, but not the *connubium*, and therefore their children were not in their power, and they could not vote for or fill public offices; and the *jus Italicum* was attached to certain privileged cities; but the provinces generally had no participation in either right. They were subject to a proconsul or proprætor, paid taxes to the treasury of Rome, and had as much of the law of Rome imposed upon them, and were made to conform as nearly to Roman political notions, as their conquerors considered expedient.*

Change in Roman Law under the Prætors.

12. But the contact of Rome with foreign nations produced a much more remarkable effect on Roman law than the introduction of a new branch of law regulating the position of subject nations. It wrought, or at least contributed largely to work, a revolution in the legal notions of the Roman people. It forced them to compare other systems with their own. In the language of the jurists, it brought the *jus gentium*, that is, the law ascertained to obtain generally in other nations, side by side with the *jus civile*, the old law of Rome. The *prætor peregrinus*, who was appointed (B.C. 246) to adjudge suits in which persons who were not citizens were parties, could not bind strangers within the narrow and technical limits in which Romans were accustomed to move. Many of the most important parts of Roman law were such that their provisions could not be extended to any but citizens. No one, for instance, except a citizen, could have the peculiar ownership termed *dominium ex jure Quiritium*. But when justice and reason pronounced a stranger to be an owner, it was impossible for a prætor not to recognise an ownership different from that which a citizen would claim; and what magistrates were obliged to do in the case of strangers, the requirements of advancing civilisation soon induced them to do in the case of citizens. They recognised and gave effect to principles different from those of the municipal law of Rome. This municipal law remained in force wherever its provisions could give all that was required to do substantial justice; but when they could not, the prætor appealed to a wider law, and

* See WARNKŒNIG, *Hist. du droit romain externe*, p. 70. SAVIGNY, *Geschichte d. röm. Rechts*, vol. i. ch. 2.

sought in the principles of equity a remedy for the deficiencies of the *jus civile*. He pronounced decrees (*edicta*), laying down the law as he conceived it ought to be, if it was to regulate aright the case before him. In process of time it became the custom for the prætor to collect into one *edictum* the rules on which he intended to act during his tenure of office, and to publish them on a tablet (*in albo*) at the commencement of his official year. The edict, put forward at the beginning of the year of office, and running on from one prætor to another, was termed the *edictum perpetuum*. How much the prætor was aided in the formation of a broader and more comprehensive system of law by a change in the form of actions, will appear when we come to speak of the system of civil process. By degrees such a system was introduced and fully established, and the *jus honorarium*, the law of the prætors * (*qui honores gerebant*), was spoken of as having a distinct place by the side, and as the complement, of the *jus civile*.

The judges.

The prætors gave the formula of an action to the judge. For many centuries senators alone were judges until the *lex Sempronia* (B.C. 123) took away the right of being judges from the senators, and gave it to the knights. After a series of contests the right was shared by the two orders, and extended even to persons of inferior rank, so that the 300 of the senatorial times had become 4000 by the time of Augustus. Besides the judges placed on the annual list (*in albo relati*) there were the *recuperatores*, who at first were appointed to determine causes to which *peregrini* were parties, but at a later period had jurisdiction in the causes of citizens. They were taken from every rank for the special occasion, sat three or more together, and were used in cases requiring despatch. And there were also the *centumviri*, taken so many from each tribe, and who judged of cases of *status*, Quiritary property, and testamentary and intestate succession.

The juris prudentes.

13. The progress of law was also much facilitated by the growth of a body of men termed *juris consulti* or *juris prudentes*, men who studied the forms and, in time, the principles of law, and expounded them for the benefit of their friends and dependents. They were generally among the first men of the State, and the employment was considered a natural part of a life of public service and magisterial honours.

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* The term also included the edicts of the ædiles, who issued decrees in matters that came specially within their province.

In the earlier times of the republic the patricians alone knew the days on which it was or was not lawful to transact legal business, and the forms in which actions were to be brought. The story of the publishing of a collection of these forms, and of a list of the days on which business could be transacted, by Cneius Flavius, is familiar to all readers of Livy.* But although to a certain extent the study of the law became open to all, whether patricians or plebeians, yet it does not seem to have been ever undertaken except by men of eminence. Such men used to instruct and protect the persons who sought their advice, explain the steps necessary for the successful conduct of an action, and write out the necessary forms.† They gave answers when asked as to the law on a particular point; and though they professed only to interpret the Twelve Tables, not to make laws, their notion of interpretation was so wide that it included whatever could be brought within the spirit of anything which the Twelve Tables enacted. Such answers (*responsa*) were of course of no legal authority; but as the sage would frequently accompany his client ‡ (as the questioner was called) before the magistrate, and announce his opinion, it had frequently all the effect upon the magistrate which a positive enactment would have had, and thus the *responsa prudentum* came to be enumerated among the direct sources of law. The names of some of these sages have been handed down to us. Cato the censor, and Severus Sulpicius, the contemporary of Cicero, are those otherwise best known to us.§ In the latter days of the republic the *juris prudentes* were men acquainted with some portion at least of Greek philosophy, men of learning and general cultivation; and it is not difficult to understand how powerfully their authority, acting almost directly on judicial decisions, must have contributed to the change which the law underwent towards the end of the republic.

The law of nature.

14. By far the most important addition to the system of Roman law which the jurists introduced from Greek philosophy, was the conception of the *lex naturæ*. We learn from the writings of Cicero whence this conception

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* LIV. ix. 46.

† The duty of a jurisprudent was *respondere, agere, cavere*.—CIC. *de Orat.* i. 48.

‡ *Clienti promere jura.*—HOR. *Epist.* Bk. ii. Ep. i. 104. *Cliens* means literally 'a listener'.

§ GIBBON, viii. 31.

came, and what was understood by it.* It came from the Stoics, and especially from Chrysippus. By *natura*, for which Cicero sometimes substitutes *mundus*, was meant the universe of things, and this universe the Stoics declared to be guided by reason. But as reason is thus a directive power, forbidding and enjoining, it is called law (*lex est ratio summa insita in natura, quæ jubet ea quæ facienda sunt, prohibetque contraria*). But nature is with the Stoics both an active and a passive principle, and there is no source of the law of nature beyond nature itself. By *lex naturæ*, therefore, was meant primarily the determining force of the universe, a force inherent in the universe by its constitution (*lex est naturæ vis*). But man has reason, and as reason cannot be twofold, the *ratio* of the universe must be the same as the *ratio* of man, and the *lex naturæ* will be the law by which the actions of man are to be guided, as well as the law directing the universe. Virtue, or moral excellence, may be described as living in accordance with reason, or with the law of the universe. These notions worked themselves into Roman law, and the practical shape they took was that morality, so far as it could come within the scope of judges, was regarded as enjoined by law. The jurists did not draw any sharp line between law and morality. As the *lex naturæ* was a *lex*, it must have a place in the law of Rome. The prætor considered himself bound to arrange his decisions so that no strong moral claims should be disregarded. He had to give effect to the *lex naturæ*, not only because it was morally right to do so, but also because the *lex naturæ* was a *lex*. When a rigid adherence to the doctrines of the *jus civile* threatened to do a moral wrong, and produce a result that was not equitable, there the *lex naturæ* was supposed to operate, and the prætor, in accordance with its dictates, provided a remedy by means of the pliant forms of the prætorian actions. Gradually the cases, as well as the modes in which he would thus interfere, grew more and more certain and recognised, and thus a body of equitable principles was introduced into Roman law. The two great agents in modifying and extending the old, rigid, narrow system of the *jus civile* were thus the *jus gentium* and the *lex naturæ*; that is, generalisations from the legal systems of other nations, and morality looked on according to the philosophy of the Stoics as sanctioned by a law.

* The most important passages in Cicero with reference to the *lex naturæ* are *De Leg.* i. 6-12; *De Nat. Deor.* i. 14, ii. 14. 31; *De Fin.* iv. 7. The expressions used in the text are from *De Leg.* i. 6.

But as, on the one hand, the generalisations from experience had in themselves no binding force, and as, on the other, the best index to ascertain what morality commanded was to examine the contents of other legal systems, the *jus gentium* and the *lex naturæ* were each the complement of the other, and were often looked on by the jurists as making one whole, to which the term *jus gentium* was generally applied.*

Sources of legislation.

15. The centuries met to decide questions of war and peace, and to choose the higher magistrates; but the laws which, after the *lex Hortensia*, were passed to effect any real change in the body of Roman law, were almost all *plebiscita*. The *comitia tributa* were recognised as almost the exclusive centre of legislative power; but in the later times of the republic a continually increasing importance was attached to the ordinances of the senate. Gaius says that it had been questioned whether the *senatusconsulta* had the force of law.† Perhaps they had not exactly the force of law at any time under the republic, excepting when they related to matters which it was the peculiar province of the senate to regulate; but they were probably of little less weight than enactments recognised as constitutionally binding. The senate successfully maintained a claim ‡ to exercise a dispensing power, and to release individuals from obedience to particular laws. It was generally able to reject a law, either wholly or partly, by calling in the aid of religious scruples; and if it added a clause to a law, the new portion of the law was as binding as the old.§ In the shape of directions to particular magistrates, it issued injunctions, of which the force was felt by all those who were subject to the magistrate's power; and it made, we have reason to think, independent enactments in matters belonging to religion, police, and civil administration, and perhaps even in matters of private law.‖ The senate comprised the richest and most influential men in the State; the disruption of society attending the civil wars strengthened their influence; and the Romans of the days of Cicero were quite prepared for the place which the senate held, as a legislative body, under the early Cæsars.

Plebiscita.

The Senate.

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* See AUSTIN, *Jurisprudence*, Lect. xxx. and xxxi.

† Cicero mentions them among the sources of law.—*Topic.* 5.

‡ ASCON. *Argum. in Cornel.* (Orell. p. 57).

§ ASCON. *Enarratio Cornel.* (Orell. p. 67).

‖ PUCHTA, *Instit.* sec. 75.

The growth of law during the time that elapsed between the promulgation of the Twelve Tables and the commencement of the empire is marked not only by the abolition of the actions of law and the institution of prætorian actions, but by the development of the law of obligations, the old conveyance of *nexum* having expanded into, or been replaced by, verbal and literal contracts, and real contracts being recognised where no form but the delivery of the thing was required; and four forms of purely consensual contracts being admitted as part of the civil law; to all which the prætor constantly added cases in which he announced that he would recognise and enforce an obligation. The prætor, too, protected and regulated possession as apart from ownership; and his attention was bestowed on the ties of blood, the father being to some extent restrained from disinheriting his children, and *cognati* taking the place of *gentiles* in intestate succession.

16. The first emperors were only the chief magistrates of the republic. Augustus and his immediate successors united in their own persons all the highest offices of the State. The *imperium*, or supreme command, was conferred on them by the *lex regia* passed as a matter of form at the beginning of their reign, and by which the later jurists supposed that the people devolved on the emperor all their own right to govern and to legislate.* The assumption of despotism was veiled under an adherence to republican forms; and, at any rate during the first century of our era, the emperor always affected to consider himself as nothing more than the *princeps reipublicæ*. Although we have instances, even in the time of Augustus, of edicts intended to be binding by the mere authority of the emperor, yet the people at first, and the senate afterwards, was recognised as the primary source of law. By degrees the emperor usurped the sole legislative authority, either dictating to the senate what it was to enact, or, in later times, enacting it himself. The will of the prince came to have the force of law.† Sometimes this will decided what the law should be by the publication of *edicta* pronounced by the emperor in his magisterial capacity, or *mandata*, orders directed to particular officers, or *epistolæ*, addressed to individuals, or public bodies; sometimes by *decreta*, or judicial sentences given by the emperor, which served as precedents; at other times by *rescripta*, that is, answers given

The Emperor.

* D. i. 4. 1.

† *Inst.* i. 2. 6: *Quod principi placuit legis habet vigorem.*

by the emperor to magistrates who requested his assistance in the decision of doubtful points.

Laws.

17. The people did not cease to make laws for a considerable time after the commencement of the empire.* These laws were, of course, really the creations of the emperor's will. Augustus, for instance, procured the sanction of legislation to a series of measures which made a considerable innovation in private law. These measures were designed to repress and discourage the excesses and corruption of a demoralised society. The *lex Julia et Papia Poppæa* (A.D. 9), and others of a similar character, attempted to restore virtue to private life by a system of rewards and penalties, attached to the fulfilment or neglect of family duties, and consisting chiefly in the taking away of testamentary benefits from the unmarried and childless, and giving them to those married with children, and, in default, to the treasury. They failed in their object; but the portion of law to which they belonged, and especially that of testaments and legacies, was considerably modified by their provisions. To the time of Augustus also belongs the introduction of *fideicommissa* and codicils.

The Senate.

18. After the middle of the first century of our era, all legislative enactments of which we know are *senatusconsulta*. The election of magistrates was transferred to the senate from the *comitia*,† and the senate was entrusted with the cognisance of offences against the emperor and the State, and the decision of appeals from inferior tribunals.‡ The later jurists said that the senate was made to represent the whole people, because the number of the citizens became too great to permit of their acting as a political body.§ However historically false this may be, it yet is so far true that the senate was, in the earlier times of the empire, a body distinct from, and, in a certain very limited degree, opposed to, the emperor. We have some few memorable instances in Tacitus of senators who dared to speak what they thought,‖ and who showed that the senate was, in more than name, a remnant of the republic. Gradually the very notion of independent action died away, and the senate met merely to adopt the will of its master.

* GAIUS mentions a *lex Claudia*.—GAIUS, i. 157.
† TACIT. *Annal.* i. 15.
‡ SUET. *Calig.* 2. *Nero*, 17. TACIT. *Annal.* xiii. 44.
§ *Inst.* i. 2. 5. POMPONIUS in *Dig.* i. 2. 2. 9. PUCHTA, *Inst.* sec. 106.
‖ TACIT. *Hist.* iv. 8.

19. The *edictum perpetuum*, the annual edict of the prætor, as being the written exposition of the *jus honorarium*, was the subject of many of the treatises of the Roman jurists. In the time of Hadrian, a jurist of great eminence, Salvius Julianus, was appointed by the emperor to draw up an edict, partly from existing edicts, partly according to his own opinion of what was necessary, which should serve as the guide and rule of all succeeding prætors. The edict which he drew up, and to which the sanction of Hadrian gave the force of law, was itself termed the *edictum perpetuum*, the word *perpetuum*, instead of meaning, as before, that the edict ran on from year to year, being used to express that the edict was permanent and unchangeable. The different magistrates, who had to apply the edict, would thenceforward use their own discretion only when the edict drawn up by Julianus did not serve as an express authority.

The Prætor's edict.

20. The writings of the jurists, the authority attached to their decisions, and the admirable manner in which they developed and arranged the law, formed the most marked feature of the legal history of this period. Augustus found the position which the great sages of the law held in public opinion too important a one to be overlooked in his scheme of government. He formally gave to their decisions the weight which usage had in many instances given them already; and it was enacted that their answers should be solicited and announced in a formal manner, and given under the sanction of the emperor. Hadrian decided that they should have the force of law, provided the respondents all agreed in their answer; but, if they differed, the judge was at liberty to adhere to whichever opinion he preferred.* Among the eminent jurists of the days of Augustus was Trebatius, whose opinion, as the Institutes tell us, was specially asked by Augustus as to the propriety of admitting codicils. Two others, of even higher authority, Antistius Labeo and Ateius Capito, represented in the same period two opposite modes of regarding law, and were the founders of schools which maintained and handed down their respective opinions. Labeo, in whom a wider culture had instilled a love of general principles, did not hesitate to make such innovations as he conceived reason and philosophy to require: Capito was distinguished by the fidelity with which

The jurists.

Schools of Labeo and Capito.

* Gaius, i. 7.

he adhered to the law as he had himself received it.* A succession of jurists of greater or less renown divided themselves under the banners of these rival authorities. But the schools of which Labeo and Capito were the first authors did not derive their names from their founders. The one school was termed Proculians, after Proculus, a distinguished follower of Labeo; the other Sabinians, after Sabinus, a follower of Capito. Gaius, who informs us that he was a Sabinian, gives the differing opinions of the two schools on many subtle questions of law. By the labours of this succession of jurists, the law was moulded and prepared until it came into the hands of the five great luminaries of Roman jurisprudence—Gaius, Papinian, Paul, Ulpian, and Modestinus, whose writings, as we shall see, were subsequently made a distinct and special source of law.

Gaius.

21. Gaius, or Caius, as the name is sometimes written, was probably born in the time of Hadrian, and wrote under the Antonines. Of his personal history nothing is known. He himself tells us that he was an adherent of the school of Sabinus. Besides other works which he is known or supposed to have written, he composed a treatise on the *edictum provinciale* (the edict of the proconsul in the provinces) and a commentary on the Twelve Tables. But the work by which he is best known to us is his Institutes. The discovery of the manuscript of this work by Niebuhr in 1816 has contributed greatly to the modern knowledge of Roman law. The manuscript had been written over with the letters of St. Jerome, and its existence was almost entirely unknown until Niebuhr brought it to light while examining the contents of the library of the Chapter at Verona. The Institutes of Gaius formed the basis of those of Justinian, who has followed the order in which Gaius treats his subject, and adopted his exposition of law, so far as it was applicable to the times in which the Institutes of Justinian were composed. The work of Gaius, therefore, showing us what was common to the two periods, and also where the law had changed, enables us to understand what the change was, and what the law had really been at the time when its system was most perfect.

22. Æmilianus Papinianus was the intimate friend of the

* *Ateius Capito in his, quæ ei tradita fuerant, perseverabat. Labeo ingenii qualitate et fiducia doctrinæ, qui et cæteris operis sapientiæ operam dederat, plurima innovare instituit.*—*Dig.* i. 2. 2. 47.

Emperor Septimius Severus, and held under him the office of prætorian præfect, which had now become equivalent to that of supreme judge. He probably accompanied Severus into Britain, and was present at the emperor's death at York in A.D. 211. Severus commended his two sons, Geta and Caracalla, to his care. Caracalla dismissed Papinian from his office; and, after his murder of Geta, is said to have required Papinian to compose his vindication. Papinian refused, and was executed by the orders of Caracalla. He was considered the first and greatest of jurists, and every epithet which succeeding writers could devise to express wisdom, learning, and eloquence, was heaped on him in profusion. We know, from the Digest, of his Books of Questions, Books of Answers, and Books of Definitions. The fragments of his works which we possess amply justify his eminent reputation. *Papinian.*

23. Paul, Ulpian, and Modestinus are all said to have been pupils of Papinian. Julius Paulus was a member of the imperial council and prætorian præfect under Alexander Severus (A.D. 222). Besides numerous fragments in the Digest, we possess his *Receptæ Sententiæ*, which was long the chief source of law among the Visigoths in Spain. The most celebrated of his works, which were very numerous,* was that *Ad Edictum* in eighty books. *Paul.*

24. Domitius Ulpianus derived his origin, as he himself tells us, from Tyre in Phœnicia.† He wrote several works during the reigns of Septimius Severus and Caracalla, and perished (A.D. 228) by the hands of the soldiers, who killed him in the presence of the emperor, Alexander Severus. He was prætorian præfect at the time of his death, but the exact time when he was first appointed to the office is unknown. The Digest contains a greater number of extracts from his writings than from those of any jurist. Besides these extracts, we also possess fragments of his composition in twenty-nine titles, known by the name of the *Fragmenta Ulpiani*. *Ulpian.*

25. Herennius Modestinus was the pupil of Ulpian as well as of Papinian. He was a member of the imperial council in the time of Alexander Severus, but hardly anything is known of his history. One of the best known of his writings is the *Excusationum Libri*. We have nothing remaining *Modestinus.*

* We know the names of more than seventy, embracing an extraordinary variety of subjects.

† D. 1. 15. 1. pr.

of his composition except the extracts from his works given in the Digest.

Influence of Christianity.

26. The influence of Christianity on Roman law was partly direct, partly indirect. The establishment of a hierarchical rank, the power granted to religious corporations to hold property, the distinction between Christians and heretics, affecting the civil position of the latter, the creation of episcopal courts, and many other similar innovations, gave rise to direct specific changes in the law. But its influence is even more remarkable in the changes which were suggested by its spirit, rather than introduced as a necessary part of its system. To the community which citizenship had bound together * succeeded another bound by the ties of a common religion. The tendency of the change was to remove the barriers which had formed a part of the older condition of society. If we compare the Institutes of Justinian with those of Gaius, we find changes in the law of marriage, in that of succession, and in many other branches of law, in which it is not difficult to recognise the spirit of humanity and reverence for natural ties, which Christianity had inspired. The disposition to get rid of many of the more peculiar features of the old Roman law, observable in the later legislation, was partly indeed the fruit of secular causes; but it was also in a great measure due to the alteration of thought and feeling to which the new religion had given birth. But it was not only the substance of the law that was changed under the emperor. The forms of procedure became different. Even under the formulary system the magistrate had occasionally, instead of sending the trial of an action to the *judex*, disposed of it himself (*cognitio extraordinaria*). The practice grew more frequent as the empire went on, and in A.D. 294 Diocletian ordered the presidents of the provinces themselves to try all cases. The formulary system and the exposition of the law by the prætors became a thing of the past, and the law was altered by the enactments of the emperor, and administered directly by the magistrates.

Theodosius II.

27. Before we pass to the legislation of Justinian, we must bestow a cursory notice on the efforts made by Theodosius II. to determine and arrange the law, and to

* The value of citizenship was greatly lessened by the recklessness with which it was extended. Caracalla (A.D. 212) gave the citizenship to all persons not slaves, who were then subjects of the empire, leaving it, however, possible, that slaves imperfectly manumitted after this date should hold the place of *Latini*, not of *cives*.

promote its study. With a view to keep alive and increase the knowledge of law, he founded (in A.D. 425) a school of jurisprudence at Constantinople. He and Valentinian also constituted the works of the five great writers, Gaius, Papinian, Ulpian, Paul, and Modestinus, into a source of law of the highest authority, enacting by a constitution ('the Law of Citations'), published A.D. 426, that the judge should always be bound by the opinion expressed by the majority of these writers; if those among them who expressed an opinion on the point were equally divided, the opinion of Papinian was to prevail: if he was silent, the judge could use his own discretion. In A.D. 438, Theodosius published his Code, containing a collection of the constitutions of the emperors from the time of Constantine. It was made on the model of two earlier collections compiled by the jurists Gregorianus (A.D. 306) and Hermogenianus (A.D. 365).

Justinian.

28. The emperor Justinian was of Gothic origin. His native name was Uprauda, a word said to mean upright, and thus to have found an equivalent in the Latin Justinianus. He was born at Taurisium in Bulgaria, about the year A.D. 482, and having been adopted by his uncle, the Emperor Justin, succeeded him as sole emperor in the year A.D. 527. He died in A.D. 565, after an eventful reign of thirty-eight years. Procopius, the secretary of his general Belisarius, has left us a secret memoir of the times, which, if we may rely upon his accuracy, would make us believe Justinian to have been a weak, avaricious, rapacious tyrant. His court, wholly under the influence of his wife Theodora, a degraded woman, whom he had raised from the theatre to share his throne, was as corrupt as was customary in the empire of the East. Justinian would never have been distinguished from among the long list of eastern emperors had it not been for the victories of his generals and the legislation to which he gave his name. The successes of Belisarius and Narses have shed the splendour of military glory over his reign. But his principal claim to be remembered by posterity is his having directed the execution of an undertaking which gave to Roman law a form that fitted it to descend to the modern world.

The first Code.

29. In the year A.D. 528, Justinian issued instructions for the compilation of a new code, which, founded on that of Theodosius, and on the earlier codes on which that code was based,* should embrace the imperial constitutions down

* Shortly before the time of Justinian, three attempts had been made to

to the date of its promulgation. The task was entrusted to a body of ten commissioners, who completed their labours in the following year, and in the month of April, A.D. 529, the emperor gave it his sanction, and abolished all preceding collections.

The Digest.

30. In the December of the following year, Tribonian, who had been one of the commission appointed to draw up the code, and who had recommended himself to the emperor by the energy and ability he had shown, was instructed, in conjunction with a body of coadjutors whom he selected to the number of sixteen, to make a selection from the writings of the elder jurists, which should comprehend all that was most valuable in them, and should form a compendious exposition of the law. In spite of the foundation of schools of jurisprudence, of which those of Rome, Constantinople, and Berytus were the most famous, the knowledge which the lawyers of the time had of the writings of the old jurists was exceedingly limited. Justinian wished not only to promulgate a body of law which should not be too bulky and voluminous for general use, but also to provide a work, the study of which should form a necessary part of legal education. The commissioners performed their task in the short space of three years, and on the 30th of December, A.D. 533, the emperor gave to the result of their labours the force of law. The compilation, termed Digesta, or Pandectæ, from its comprehensive character, was divided into fifty books, and was arranged on the model of the perpetual edict. Ulpian's work on the edict had been a text-book in the schools of jurisprudence, and probably it was this that determined the commissioners to adopt a model * which has prevented their work having anything like a scientific arrangement. There are thirty-nine jurists from whose writings the Digest contains literal extracts, those from Ulpian and Paul constituting about one half of the whole work.

The Institutes.

31. The Digest was too vast a work, and also required for its comprehension too great a previous knowledge of law, to admit of its being made the opening of a course of

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draw up a body of law for the use of the western barbarians and their Roman subjects. These were—the edict of Theodoric, king of the Ostrogoths (A.D. 500); the *Lex Romana Burgundiorum* (A.D. 500); and the *Lex Romana Visigothorum* (A.D. 506). These names are so well known that it is perhaps hardly proper to pass them over altogether; but, as their assistance was not employed in the construction of Justinian's legislation, a detailed account of them is unnecessary here.

* WARNKŒNIG, *Hist. du droit romain*, p. 182.

legal study. Justinian, therefore, determined to have an elementary work composed. He had declared his intention in the constitution of December, A.D. 530, in which he directed the compilation of the Digest; and Tribonian, in conjunction with Theophilus and Dorotheus, respectively professors in the schools of Constantinople and Berytus, were appointed to draw it up, and like the Digest it became law on the 30th of December, A.D. 533. This elementary work is the Institutes. It was formed on the basis of the Institutes of Gaius, alterations being made to bring it into harmony with the Digest and Code. Theophilus, shortly after the promulgation of the Institutes, published a Greek paraphrase of the work, which throws much light on many passages in the Latin, and which became the sole form in which the Institutes were known to the Greeks of the East.

In the Eastern Empire the works compiled by order of Justinian were only known by Greek paraphrases and abridgments. From these there were made from time to time compilations in which the constitutions of successive emperors were inserted. Otherwise the knowledge of Roman law may be said to have died out of the East altogether. In the West its fate was different. Justinian in 554 ordered that his different works should be observed as the law of Italy. The inroads of the Lombards, however, soon confined the sphere in which the provisions of an emperor of the East could take effect to Rome, Ravenna, and some districts of the south and centre. Here the knowledge of the legislation of Justinian never died out, until in the twelfth century there was established at Bologna a school of commentators (*glossatores*), who brought much learning, ingenuity, and industry to the study of the old law, and whose labours formed the beginning of modern researches into the subject.*

The Fifty Decisions.

32. There were still some points which had been debated by the old jurists, and to which the legislation of Justinian did not as yet furnish any answer. To determine these, Justinian published a book of Fifty Decisions; and as the Code of the year A.D. 529 was a very imperfect work, it was determined to revise that Code, and to incorporate the Fifty Decisions in the revised edition. Tribonian was appointed to superintend

* Of the Digest there is one manuscript of unknown antiquity, but certainly prior to the *glossatores*, which was found at Pisa, and was brought thence to Florence, where it now is. Of the Institutes there is no manuscript of an earlier date than one of the tenth century, known as the *codex Bambergensis.*

the undertaking, and in December, A.D. 534, the new code, called the code *repetitæ prælectionis*, received the force of law. This is the code we now have; the former code, that of A.D. 529, was carefully suppressed, and no trace of it remains. The Code, which is divided into twelve books, is arranged nearly in the same manner as the Digest.

The second Code.

33. But Justinian could not endure that his having systematised the law should exclude him from law-making. He announced in the Code * that any legislative reforms he might at any future time see fit to make should be published in the form of *Novellæ Constitutiones*. Many such *Novellæ* were afterwards published; the first in January, A.D. 535, the last in November, A.D. 564. Altogether they amount to 165; but no collection of them seems to have been made in the lifetime of Justinian. Few of them bear a later date than A.D. 545, the year of Tribonian's death.

The Novels.

34. The Institutes of Justinian, after a few general observations on the nature, the divisions, and the sources of law, proceed to treat, first of persons, then of things, then of successions to deceased persons, then of obligations, and lastly of actions. An arrangement as nearly similar as possible will be observed in the following outline of Roman private law.

Arrangement of the Institutes.

ROMAN PRIVATE LAW.

The reader of Mr. Austin's Treatise on the Province of Jurisprudence will remember that he proposes, in the outline given in the Appendix, to treat the subject of Law, by examining, first, the science of General Jurisprudence, that is, of the legal notions and principles which enter into every system of law; and secondly, the science of Particular Law, that is, as he explains it, 'The science of any such system of Positive Law as now actually obtains, or once actually obtained in a specifically determined nation'; and he carefully distinguishes between the sciences of general and particular jurisprudence and the science or sciences which would tell us, not what law is, but what law ought to be.

The Roman jurists made no approach to a division of the subject so accurate and so exhaustive. It is their great merit, the real source of their value to modern Europe, that they apprehended and elucidated the great leading principles and notions of general

* *Const. de Emend. Cod.* 4.

jurisprudence; but they did not clearly distinguish between general jurisprudence and the municipal law of Rome, or between law and morality. As we have said before, they assumed, on the authority of Greek philosophy, that there was a *lex naturæ* binding on them because it was a *lex*, and they endeavoured to work up the dictates of this law and of the *jus gentium* together with the provisions of the old *jus civile* into a whole. The Institutes of Gaius open with a declaration that every system of law must contain the two elements of general and municipal law; but in the Institutes of Justinian there are prefixed two definitions taken from the writings of Ulpian; and, while the definitions themselves illustrate the inexactness with which the jurists determined the province of jurisprudence, the place assigned to them in this compilation shows the utter want of anything like philosophy in the age when the Institutes were written. The first definition defines the moral virtue of justice by reference to a legal term (*jus*), which it leaves unexplained: the second pronounces jurisprudence to be the 'knowledge of things human and divine,' a phrase which, originally referring, perhaps, to the distinction between pontifical and secular law, has no general meaning, except as a summary of the philosophy which thought that law was the expression of a reason common to the universe and to man. We can only treat the Roman notions of law and jurisprudence historically, and ascertain what they were and whence they came; we cannot make them fit into the more accurate shapes assigned to these general terms by the modern philosophy of law.

Definitions of justice and jurisprudence.

35. The preceding historical sketch will have sufficed to show what were the sources of Roman law: (1) There was the old *jus civile*, which mainly depended on custom as its basis. (2) There were the judicial decisions of the *prætors*, and the opinions of the *juris prudentes*, supplementing the *jus civile* from the dictates of the *lex naturæ* and the *jus gentium*; and (3) There were positive enactments, which may be divided into *leges*, *plebiscita*, *senatusconsulta*, and announcements of the will of the emperor.

Sources of law.

36. The main legal term with which we have to start in approaching Roman law is *jus*. The word is used to signify both the sum of rights and their corresponding duties, sanctioned by law, and also any group, or any single one of these rights. The law prescribes different relations in which the members of a State are to stand to things and to each other.

Jus, jura.

The claim, protected by legal remedies, which each man has to have any of these relations observed in his own case is a right; and as the right must be conceived to belong to or reside in a person, we speak of a right being the right of a person, e.g. my right to have that book, your right to have that house (*jus meum, jus tuum*). When we examine the different rights established by law in a State, we find some of a public character, affecting individuals as members of a body politic; others of a private character, affecting individuals directly. It is only of the private rights established by Roman law that we now propose to speak; and as rights are either rights which persons have over things, or rights which persons have against some other person or persons, we shall treat, first, of the mode in which the Roman law regarded persons; then of the mode in which it regarded things; then of the rights it gave to persons against persons; and, lastly, of the method by which the State enforced private rights when disputed or disregarded, that is, the system of civil process.

Rights.

Division of the subject.

I. PERSONS.

37. The word *persona* had, in the usage of Roman law, a different meaning from that which we ordinarily attach to the word person. Whoever or whatever was capable of having, and being subject to, rights was a *persona*. Slaves were *personæ* in the sense that they were not merely things, and they could go through some legal forms and were entitled in later times to a certain amount of legal protection; but although they are thus treated of under the law of persons, it is chiefly their want of legal capacities that attracts attention. Many *personæ*, however, had no physical existence. The law clothed certain abstract conceptions with an existence, and attached to them the capability of having, and being subject to, rights. The law, for instance, treated the State as a *persona*, capable, for example, of owning land or slaves (*ager publicus, servi publici*). So, a corporation, or an ecclesiastical institution, was a *persona*, quite apart from the individual *personæ* who formed the one and administered the other. Even the *fiscus*, or imperial treasury, as being the symbol of the abstract conception of the emperor's claims, was spoken of as a *persona*.

Meaning of the word persona.

38. The technical term for the position of an individual re-

garded as a legal person was *status*, and the constitutive elements of his *status* were liberty, citizenship, and membership in a family. First, he must be free. A slave had no rights. In the earlier days of Roman law, no one would have conceived this to be unnatural. But philosophy, and the study of morality, taught the later jurists that the condition of a slave was a violation of natural law. It was not, however, necessary that the person should have been born free (*ingenuus*); for the process of manumission placed the slave in some degree on a level with the *ingenuus* by making him a freedman (*libertinus*, or, if spoken of with reference to his patron, *libertus**). It depended on the mode and circumstance of his manumission whether he became at once a Roman citizen; but in whatever way he was enfranchised he still owed certain duties to his patron, and in certain cases his patron was his heir.

Status.

Freedom.

39. The second element of the *status* was citizenship. The Roman notion of the State was that of a compact privileged body separated off from the rest of the world by the exclusive possession of certain public and private rights. In the early times of Rome the *cives*, or members of the State, were divided into two bodies of *patres* and plebeians, the former of whom had a public and sacred law peculiar to themselves, while they shared with the latter the system of private law. Beyond the State all were *hostes* and *barbari*. But as civilisation advanced, the number of foreigners who resorted to Rome for trade, or were otherwise brought into friendly relations with citizens, was so great that they were looked upon as a distinct class, that of *peregrini*. To be a citizen was thenceforward not to be a *peregrinus*, the force of the one idea being brought out by the prominence of its opposite. A *peregrinus* was subject to the *jus gentium;* citizens alone could claim the privileges of the *jus Quiritium*. But when her conquests placed Rome in new and varying relations with the nations of Italy, an intermediate position between the citizen and the *peregrinus* was accorded to the more privileged of the vanquished. Some of the rights of the citizen were given to them, and some were withheld. These peculiar rights of the citizen were summed up in the familiar term *suffragium et honores*, the right of voting and the capacity of holding magisterial offices, and in the terms *connubium* and *commercium*.

Citizenship.

* The Latin for a freedman was *libertinus ;* but *libertus Titii* is the Latin for the freedman of Titius.

Connubium is a term which explains itself. The foundation of the Roman family was a marriage according to the *jus Quiritium*, and not to have the *connubium* was to be incapable of entering into the Roman family system. In the word *commercium* were included the power of holding property and making contracts according to the Roman law, and also the *testamenti factio*, or the power to make or witness a will, and to accept property under one. By the *jus Latinum* and the *jus Italicum* various modifications of the different rights implied in the *civitas* were granted. The *jus Latinum* gave private rights to individuals, the *jus Italicum* gave public rights to towns. In some cases the *jus Latinum* gave the *connubium* and *commercium;* in some only the latter, in many only a portion of the latter, the *testamenti factio*, the power of making, or taking under, a testament, being withheld. The *jus Italicum* gave certain favoured towns a free municipal constitution, an immunity from direct taxation, and made the soil subject to Quiritarian ownership (see sec. 58). In the course of time other shades between the *civis* and the *peregrinus* were introduced, but all distinction between them was gradually swept away by the increasing recklessness with which the rights of citizenship were bestowed. At last Caracalla made all the free subjects of the empire citizens; and thenceforward the class of *peregrini*, properly speaking, ceased to exist. All the free inhabitants of the civilised world were *cives*, and beyond were nothing but *barbari* and *hostes*.

The family.

40. The Roman family, in the peculiar shape it assumed under the *jus Quiritium*, was modelled on a civil rather than on a natural basis. The tie which bound members of the same family was not that of blood; it was their common position in the midst of a peculiar system. For the formation of such a family, a legal marriage was an indispensable preliminary; but it was only a preliminary, and the peculiar character of the family did not in any way flow from the tie. The head of the family was all in all. He did not so much represent as absorb in himself the subordinate members. He alone was *sui juris*, i.e. had an independent will; all the other members were *alieni juris*, their wills were not independent, but were only expressed through their chief. The *paterfamilias*, the head of the family, was said to have all the other members of his family in his power; and this power (*patria potestas*) was the foundation of all that peculiarly characterised the Roman family. At the head of the family stood

the *paterfamilias* alone. Beneath him came his children, sons and daughters, and his wife, who, in order to preserve the symmetry of the system, was treated by law as a daughter.* If a daughter married, she left this family, and passed into the family of her husband, but if a son married, all his children were as much in the power of the *paterfamilias* as the son himself. Thus all the descendants through the male line were in the power of the same person. And it was this that constituted the link of family relationship between them, not the natural tie of blood. When the *paterfamilias* died, each of the sons became in his turn a *paterfamilias;* he was now *sui juris,* and all his own descendants through the male line were in his power. Each of the daughters, as long as she remained unmarried, was also *sui juris;* but directly she formed a legal marriage, and thereby entered into her husband's family, she passed into the power of another. Hence it was said that a woman was at once the beginning and end of her family, *caput et finis familiæ suæ,* for directly she attempted to continue it, she passed into another family.

Position of persons in potestate.

41. Persons who were under the power of another could not hold or acquire any property of their own. All belonged to the *paterfamilias;* and whatever the son acquired was acquired for the father. In matters of public law the *filiusfamilias* laboured under no incapacities; he could vote or hold a magistracy, but in all the relations of private law he was absolutely in his father's power. He could not make a will, for he had no property to dispose of; nor bring an action, for nothing was owing to him. But in all public relations, whenever this incapability of possessing property was not in question, the *filiusfamilias* had all the privileges of a citizen; he had, for instance, the *connubium,* and could contract a legal marriage; and the *commercium,* and could, therefore, be a witness in a sale by mancipation, to which none except citizens could be witnesses. The indulgence of later times permitted the *filiusfamilias* to hold certain property apart from the *paterfamilias,* an indulgence first accorded as an encouragement to military service. But this was always treated as a notable departure from the strict theory of law.

42. The distinction between the legal and the natural family

* She was technically said to be in the *manus* of her husband; and perhaps *manus* is the old word signifying the power of the *paterfamilias,* and *potestas* is only an expression of later Latin.

is illustrated by its being possible for a member of the legal family to quit it and become an entire stranger to it, and for an entire stranger to be admitted to it, and be as completely a member as if he were a son of the *paterfamilias*. The mode by which the change in either case was accomplished was by a fictitious sale. Every Roman citizen could sell himself to another by the peculiar form of sale called *mancipatio ;* and as the father possessed over the son the rights which a person *sui juris* possessed over himself, he sold the *filiusfamilias* to a nominal purchaser, who was supposed to buy the son. It was declared by the law of the Twelve Tables, that a son thrice sold by his father should be free from his power, and the ceremony was therefore repeated three times, and the son was then *emancipatus*, or sold out of the family. When a stranger, being himself *alieni juris*, wished or was compelled to enter a family, the process was effected by adoption. Here, again, then, was another sale, the *paterfamilias* of the family he quitted being the seller, and the *paterfamilias* of that he entered being the purchaser. If the stranger was *sui juris*, he entered his new family by arrogation, which in ancient times could only be effected by a vote in the *comitia curiata*, it being considered a matter of public policy to keep a watch over such a proceeding, lest the last of his *gens* should arrogate himself, and its *sacra* be lost. Much simpler modes for effecting arrogation, as well as for effecting emancipation and adoption, were employed in later times; and one of the most important changes in law introduced by Justinian was that by which he altered the character of adoption, and decreed that, unless the adopter was an ascendant, the person adopted should not pass out of his natural family.

Emancipation.

43. A person might be *sui juris*, and be in possession of every right, and yet be unable, through some imperfection, to exercise the rights he possessed. A child, for instance, was not only not able to conduct his affairs with discretion, but he was unable to understand, perhaps to speak, the forms necessary to be expressly pronounced in almost every legal transaction. A tutor was therefore appointed, who, until the child attained the age of puberty, supplied this defect of his ward, or, as he was called, his pupil. And this is the Roman notion of a tutor: he was a person who supplied something that was wanting, who filled up the measure of his pupil's *persona*.* He of course

Tutors and curators.

* *Persona* had in Roman law a double signification. It meant a person

took care of the person and property of the child; but this was only an accessory of his position; his primary office was to supply by his *auctoritas* * what the pupil fell short of. So, too, in the old law, unmarried women, of whatever age, remained in the tutelage of their relations. Further, a person might be *sui juris*, and be of an age to exercise his rights, and yet it might be necessary to insure that he did not hurt himself and his family by the mode in which he exercised them. In such cases, a curator was appointed, whose duty it was to look after his property. This curator had a perfectly different office from a tutor; in technical language, the tutor was said to be appointed to the person, the curator to the property. The curator was only appointed as a check to prevent pecuniary loss. Curators were also appointed to watch over the interests of insane persons, and of persons notoriously prodigal, as well as of those who had attained the age of puberty, but were under the age of twenty-five.

Agnati.

44. While the head of a family lived, all those who were in his power were connected together by the tie of subjection to the power of the same person. The tie was called *agnatio*, and the persons so mutually connected were *agnati* to each other. When the *paterfamilias* died, the tie of *agnatio* still subsisted. Each of those who, by his death, became *sui juris*, became the head of a new family; but still they and their descendants were *agnati* to each other so long as they did not by emancipation or by adoption, or, in the case of women, by marriage, leave their original family. All those, in short, who would have been *agnati* to each other if the life of the original *paterfamilias* had been prolonged, were *agnati* at any distance of time, however great, after his death. A number of distinct families might thus, when looked on as connected by *agnatio*, be spoken of as one family; for they were all portions of the family of a deceased *paterfamilias*.

45. Beyond the circle of the *agnati*, the ancient patrician had that of the *gens*. They were nearer to him than those who were only related to him by blood. If a patrician died intestate, in

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in the sense used above in sec. 37. It also meant all or some of the capacities attaching to a person. The *persona* (taken generally) of a person was thus the sum total of all his legal capacities, and the same person as a husband or father had the *persona mariti* or *patris*.

* The derivation of *auctoritas* should never be lost sight of. When one person increased, *augebat*, what another had, so as to fill up a deficiency, this increasing or filling up was called *auctoritas*.

default of *agnati*, his *gentiles*, the men of his *gens*, were his heirs.

Gentiles. He was placed in the midst of two artificial circles, shutting out the natural circle of blood relations; while the plebeian, unless he happened to belong to one of the few plebeian *gentes*, and, when the system of *gentes* had faded away, the patrician also, acknowledged the ties of blood as next to that of *agnatio*.

Cognati. All those who were connected together by the ties of blood were *cognati*. It was the tendency of the later Roman legislation to give greater and greater weight to the ties of blood, and to substitute a natural, for an artificial, system of family relationship.

Affines. Lastly, the *cognati* of each of the parties to a marriage were said to be *affines* to the other party.

46. We have spoken as if the wife had been always in the *manus*, or power, of her husband.

Position of the wife. And this was so, probably, in the strict theory of the Roman family, and in the practice of early times. The tie of marriage was formed among the patricians by the ceremony of *confarreatio*, in which none could partake except those who had the privileges of the *jus sacrum*; and apparently the mere fact of going through the ceremony placed a wife in the *manus* of her husband. The plebeians had no corresponding ceremony; and in order that, when two persons came together in marriage, the wife should be in the power of the husband, she was sold to the husband by the father, a process which was termed *coemptio*, or if she remained with her husband a year, then the power over her was acquired by *usus*, that is, by the uninterrupted lapse of time. If, however, she absented herself for three consecutive nights in the year, this prevented her falling into the husband's power. Perhaps, at all times, at least in plebeian families, a woman could so marry as not to fall into the *manus* of her husband; and in later times such marriages formed the rule. It made no difference in other relations of the family whether the wife was in the power of the husband or not. Supposing she and her husband had the *connubium*, that is, were capable of intermarrying, all the usual incidents of a marriage, such as the *patria potestas*, attached to the connection.

Concubinage. If a man and a woman entered into a permanent connection without marriage (*concubinatus*), their children were *naturales liberi*, and were so far favoured by the later law as to be capable of being placed in the position of children sprung from a legal marriage, by the process

of *legitimatio*. After the time of Constantine they might be made legitimate by the subsequent marriage of their parents. In all unions of the sexes, other than a legal marriage, the children followed the condition of their mother: being free, that is, if she was free, and slaves if she was a slave. The union of slaves was called *contubernium;* but however solemnly entered into, and however faithfully its natural tie acknowledged, it was never in the eye of the law regarded as anything better than promiscuous intercourse.

Deminutio capitis.

47. It was possible that any one who possessed a complete *status* should undergo a change of *status*, and this change might happen in any one of the three component parts of the *status*. The capability of exercising all those rights implied in a perfect *status* was frequently spoken of as a man's *caput*, and the change in each of these component parts was said to be a *deminutio capitis*, a lessening or impairing of the *caput*. First, a man might lose his freedom; he might be taken prisoner by an enemy, or undergo a very severe criminal sentence. The loss of this element of the *status*, called *capitis deminutio maxima*, involved the loss of the remaining two, the person who ceased to be free ceasing also to have the rights of citizenship or family rights. Secondly, he might lose his rights of citizenship, and this loss, called *capitis deminutio media*, involved the loss of family rights, but still left him free. Thirdly, by what was called *capitis deminutio minima*, he might lose his position in his family by emancipation or arrogation. In early times there were rights, principally those forming part of the *jus sacrum*, which a person who passed out of his family really lost; but in later times, as in every case the person who underwent this *capitis deminutio* either entered another family, or became the head of his own family, his *status* was really not made at all less perfect by the change. Of course this *capitis deminutio* involved the loss of neither of the two other component parts of the *status*.

Existimatio.

48. When a person was possessed of a perfect *status*, he was considered to enjoy a high dignity and reputation in the eyes of others. This reputation (*existimatio*) the Romans considered as one of the chief possessions of a person. It was even to a certain extent regulated by law. If a person ceased to be free, his *existimatio* was gone. Certain offences were treated by law as impairing it. If the offence was so grave as to

impair the *existimatio* very seriously, its diminution was said to amount to *infamia*. For example, a partner, or a mandatary, condemned in an action *pro socio* or *mandato*, was stamped with infamy. The consequences of infamy were, that the guilty person could not vote, could not receive public honours, and could not bring a public prosecution. If the offence was rather less grave, the consequence was *turpitudo;* and if the person was in some inferior position, as, for instance, an actor, he was said to be marked with a *levis nota,* a slight brand of disgrace.

End of the existence of persons.

49. It only remains to be observed that, although persons that were the mere creations of law, as corporations, ceased to exist when the law in any way put an end to their existence, as by the dissolution of the corporation, yet the person of individuals, that is, their legal, as opposed to their natural being, did not become extinct by their death. At the moment of death it was shifted to those who represented them. The son was clothed with the person of the father, the heir with that of the testator. What we mean by saying that the deceased is represented, that is, again made present and brought before us, the Roman jurists expressed by saying that his person had been shifted to those who succeeded in his place.

II. THINGS.

Use of the word res.

50. The word thing (*res*) has, in Roman law, a sense as artificial and as wide as the word person. As person comprehends every legal being that has rights and is subject to them, so thing comprehends all that can be considered as the object * of a right. The object of a right may be incorporeal, or the pure creation of law, and need not be limited to things corporeal and visible. The law can separate the right to possess a field and the right to walk in it, and the object of each right is called indifferently a thing. When we attempt to classify these objects of rights, we are unable to select any one principle of division according to which we may distribute them. The aspects in which we may view them are too various to admit of a simple arrangement; we may, however, make a division approximately accurate by considering, first, those heads of things which we arrive at by examining the nature of the things themselves; and secondly, those which we arrive at by inquiring into the interest which persons have in them.

* This word is here used in the sense of the German writers and corresponds with Austin's 'subject'.

51. First, then, things may be corporeal or incorporeal; or, as the jurists expressed it, *tangi possunt* or *tangi non possunt*. We see a house or a field; we do not see a right to inhabit the one or reap the fruits of the other. The physical tangible object of sense is a corporeal thing; the intangible abstraction of the mind is an incorporeal thing. Incorporeal things always consist in a right; if we see a stream flowing, or a path winding through a field, the mind sees, as something distinct from the object of sense, the power of using the water or of following the path. This power is, in the language of the law, an incorporeal thing; and a person may have a right to possess it just as he may have a right to possess a house or field. Strictly speaking, the right to own a field, and not the field itself, is what the law takes cognisance of, and this is as much incorporeal as the right to walk over it. But Roman law has adopted or introduced the popular way of speaking, according to which we say, 'I have a field'; 'I have a right of way over a field'.

Division of things. Corporeal and incorporeal.

52. We may again speak of corporeal things as moveable and immoveable (*res mobiles, se moventes,* and *res soli, res immobiles*), a distinction so obvious that it needs no other remark than that some moveable things are so incorporated with immoveables, or so constantly associated with their use, that the law treats them as immoveables, as for instance a house, each brick of which is a moveable, is itself an immoveable, because attached to the soil.

Things moveable and immoveable.

53. Things are also either divisible or indivisible. We cannot divide a slave or a horse so that the several parts have the same value which they had when they were parts of a whole; but if we divide a field into four, we have four small fields.

Things divisible and indivisible.

54. They are also principal or accessory; that is, they are the direct object of rights, or are only so as forming a portion of, or being intimately connected with, something that is; thus a tree is a principal thing, its fruit an accessory.

Things principal and accessory.

55. Another distinction relating to things familiar to the Roman jurists was that between the *genus* and the *species*. By the *genus* was meant a whole class of objects, such as horses, or the general name for an object, such as wine, oil, wheat. *Species* was the particular member of the

Genus and species.

class, or particular portion of the object comprehended under the *genus*, as *this* horse, or the wine in *this* bottle. If a purchaser bought a horse, or a certain quantity of oil, the thing bought was said to be determined *genere;* if he bought a particular horse or the oil in a certain vase, the thing bought was said to be determined *specie*. All things which are included under a general name, such as oil or wheat, are commonly divided by being weighed, numbered, or measured, and were therefore spoken of by the jurists as being those things *quæ pondere, numero, mensurave constant.*

Res singulares and rerum universitates.

56. We may, lastly, regard things as particular, or as collected under some head, when the whole collection is a thing in law. Thus a sheep is a particular thing (*res singularis*); a flock, composed *ex distantibus uni nomini subjectis,* is a collection of things, or, as the jurists expressed it, is a *rerum universitas* (or simply *universitas*). As also, of course, are such comprehensive things as an inheritance, a marriage portion, the *peculium* of a slave.

Res sacræ.

57. In proceeding to the second division of things according to the persons who have rights over them, and to the extent of those rights, we must first notice the distinction in things caused by certain things having a sacred character (*res divini juris*). These were *res sacræ,* consecrated to the superior gods; or *res religiosæ,* such as tombs or burial-grounds, consecrated to the infernal gods; or, lastly, *res sanctæ* (hallowed), things human, but having a sort of sacredness attaching to them, such as the walls and gates of cities.

Ager Romanus.

58. The State, again, impressed on some things a peculiar character. All things which were held by *peregrini* and not by citizens were *peregrina.* The soil which was included in the territories of the early State, the *ager Romanus,* was distinguished from all other land by being alone capable of being the subject of sale by mancipation and being alone held by the special tenure of the *jus Quiritium.** In later times a greater portion of the soil of Italy was placed on the same footing with the soil of the *ager Romanus,* and *solum Italicum* came to be the name of all soil wherever situated to which the privileges of the old *ager Romanus* were accorded, as opposed to *solum provinciale,* which always remained, at least in theory, the

* Dion. Halicarn. iv. 13.

property of the State, and of which a perfect ownership could not be acquired.* This difference in the tenure of the soil, which had in reality disappeared by the time of Diocletian, was formally abolished by Justinian.

Res mancipi.

59. In the older law there also prevailed a distinction, abolished by Justinian, between *res mancipi* and *res nec mancipi.* We know from a fragment of Ulpian,† what things were *res mancipi.* They were *prædia in Italico solo,* whether in the country or the city, servitudes (a term to be explained presently) over these *prædia,* when in the country, slaves and four-footed animals, as oxen and horses, tamed for the service of man. All other things were *nec mancipi.* We also know that property in *res mancipi* could only be transferred by *in jure cessio* (see sec. 73), and by *mancipatio,* that is, by a form of sale, in which the purchaser took hold with his hand of the thing purchased, and, claiming it to be his, struck the scales with a piece of copper, which he then tendered to the seller.‡ The list of *res mancipi* is evidently a list of the possessions of an early agricultural community, and there can be scarcely any doubt that the form of sale required to transfer the property in them was the ordinary form of sale in such a community. At some period, and in some manner of which we have no knowledge, these possessions of an early agricultural community were contrasted with other forms of wealth, and the mode of transfer customary in the one case was found not to be customary in the other. The law, sanctioning and embodying the custom, made the form of *mancipatio* necessary to pass *res mancipi,* and declared it not to be necessary to pass other things. *Manus,* as signifying power,§ is, probably, the root of the phrases *mancipi* and *mancipatio.* Thus *res mancipi* meant originally things in the hand, or taken by the hand, of the owner, and the taking by the hand in the form of transfer was symbolic of the purchaser holding or acquiring the thing in the way in which the seller had held or acquired it.

60. If we look at things according to the persons by whom they are owned, we have a division into *res communes,* as the sea

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* ULP. *Reg.* xix. 1; CICERO, *Pro Flacco,* 32; GAIUS, ii. 27.

† ULP. *Reg.* xix. 1.

‡ The form of *mancipatio* will be more fully noticed in sec. 81.

§ How *manus* signifies power is a further question; it may be that the hand is merely a metaphor, as we say 'in the hands' for 'in the power' of a person; or it may mean the hand of a conqueror or plunderer, and thus originally things *manu capta* would be the booty of plunderers.

and the air, which cannot be appropriated by any particular individuals; *res publicæ*, things which belong to the State, as the State land (*ager publicus*), navigable rivers, roads, &c.; *res universitatis*, things which belong to aggregate bodies, as to corporations; and *res privatæ*, things which belong to individuals; and these were said to be *in nostro patrimonio*, i.e. we could, in one way or another, have a property in them: whereas things common, or public, or dedicated to the gods, were *extra patrimonium*, i.e. could not become the subject of private property. Lastly, there were *res nullius*, things of which no one has acquired the ownership, as wild animals, or unoccupied islands in the sea.

Res communes. *Res publicæ.* *Res privatæ.* *In nostro patrimonio.* *Res nullius.*

61. Having thus given a sketch of the position of persons in Roman law, as also of the divisions of things, we now proceed to speak of that connection between persons and things with what are termed rights express. The necessities of his physical position oblige man to exert his power over the world of things. At first property is held by the tribe or community, then by the family, and lastly by the individual; and when society has reached this last stage, which it had reached in the earliest known times of Roman law,* his special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim sanctioned by law is urged directly: the owner, as he is said to be, of the thing publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing can confer. Sometimes the claim is more indirect; the claimant insists that there are one or more particular individuals who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal expressed by writers of the middle ages,† on the

Rights. *How divided.*

* We have, however, such expressions as *sui heredes* applied to children who, after the death of the *paterfamilias*, took the inheritance as something belonging to themselves, and this is obviously a survival from the times when the family rather than the individual was regarded as the owner of property.

† The term *jus in re* appears in the summary of law bearing the name of

analogy of terms found in the writings of the Roman jurists, by the phrases *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*,* is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or, to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of the right, as well as a thing as its object, a right which gives its possessor a power to oblige another person to give or procure, or do or not do something. It is true that in a real right the notion of persons is involved, for no one could claim a thing if there were no other persons against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done, or not done. But the leading principle of the distinction is simple and intelligible; and though it has not been formally adopted in the system of the Institutes or of the leading jurists, yet the classifications of the different relations of persons and things which they actually employed are so capable of being assimilated to that which this distinction suggests that we need not hesitate to adopt it.

III. RIGHTS OVER THINGS.

Dominium.

62. The most complete right over a thing is of course that possessed by the absolute owner of the thing, the person who has power to dispose of it as he likes, and who holds it by a title recognised as valid by law. This ownership was in Roman law expressed by the word *dominium*, sometimes by *proprietas*. The *dominus* was entitled to use the thing (*usus*), to enjoy all its products (*fructus*), and to consume the thing entirely if it was capable of consumption (*abusus*). He could also dispose of or alienate it at will. In the ancient system of private law, the owner was said to be owner *ex jure Quiritium*.

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the Brachylogus, which belongs to the twelfth century; both phrases occur in the pontifical constitutions of the thirteenth century. (See *Lib. Sextus Decret.* iii. 7, 8, *in quibus jus non esset quæsitum in re, licet ad rem.*)

* The objection to using the term *jus in re* is that the expression occurs in the classical jurists as meaning an interest in a thing short of ownership, as the interest of a mortgagee in the thing pledged, and on this ground the term *jus in rem*, which in this sense is not found in the classical jurists, but is supported by the analogy of the familiar term *actio in rem*, seems preferable.

Nor did the old law recognise any *dominium* other than that which was enjoyed *ex jure Quiritium.* But the prætors found occasions when they wished to give all the advantages of ownership but were prevented by the civil law from giving the legal *dominium.* Another kind of *dominium* came therefore to be spoken of; and the term *in bonis habere* was used to express an ownership which was practically absolute because it was protected by the prætor's authority, but which was not technically the same as ownership *ex jure Quiritium.* Commentators have called this ownership the *dominium bonitarium,* a term not, however, used by the jurists. The distinction between the *dominium bonitarium* and that *ex jure Quiritium* entirely disappeared under Justinian.

Possessio.

63. To the notion of *dominium* was opposed that of *possessio.* A person might be owner of a thing and yet not possess it, or possess it without being the owner. Possession implied actual physical occupation, or *detention,* to use the technical term, of the thing; but it also implied something more in the sense in which it was used by the Roman lawyers. It implied not only a fact, but an intention; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he might be well aware that he was not the real owner, and had no claim to be so. The possessor was entitled to have his possession protected against every one but the true owner, and length of possession would, under certain conditions fixed by law, make the possessor really become the owner of the thing possessed.

Servitutes.

64. As the rights over a thing may be very numerous, it is perfectly possible to separate them, and to give some to one person and some to another. We can, for instance, separate the right of walking in a field from the right of digging under the surface, and give the right of doing the one to this person and of doing the other to that. In this way each right that is separated off may be considered as a fragment of the whole *dominium* capable of being given away from the proprietor. These fragmentary rights, these portions of the whole right comprised in the absolute ownership, were termed *servitutes,* because the thing was under a kind of slavery for the benefit of the person entitled to exercise over it this separate right. In

some servitudes, the right over the thing subject to the servitude, *res serviens*, was attached to the ownership of another thing (*res dominans*): the servitudes were then spoken of as *servitutes rerum* or *prædiorum*, and a distinction was made in these servitudes according as the right given by them referred to the soil itself, as the right to go or to drive over it, when the servitudes were said to be *rusticorum prædiorum*, or to the soil as supporting some superstructure, as a house, when the servitudes were said to be *urbanorum prædiorum*. In other servitudes, the right was given to particular persons; and the servitudes were then termed *servitutes personarum*. The most important of these latter servitudes were *ususfructus* and *usus*. *Ususfructus* was the right to enjoy a thing belonging to another person so as to reap all the produce derivable from it, as, for instance, all the fruits of the soil; *usus* was the right to use and enjoy a thing belonging to another person, only without reaping any, or only a small portion, of its produce. Only immoveable property was subject to the *servitutes prædiorum;* both moveable and immoveable to the *servitutes personarum.*

Emphyteusis and superficies.

65. There were two other rights over things which had something of the nature of servitudes, but which received a particular name. These were *emphyteusis* and *superficies*. The former was an alienation of all rights except that of the bare ownership for a long term, in consideration of the proprietor receiving a yearly rent (*pensio*); the latter was the alienation by the owner of the surface of the soil of all rights necessary for building on the surface, a yearly rent being generally reserved.

Jus pignoris.

66. Lastly, there was the right given over a thing by pledge or mortgage, *pignus*, *hypotheca;* the former term being used to express the case of the thing, over which the right was given, being placed in the possession of the creditor, the latter to express the case of it being left in the possession of the debtor. The right was given to secure a creditor the payment of his debt; and he ultimately had power to sell the thing, and to satisfy his claim out of the proceeds, or, if he could find no purchaser, to have himself made owner of the thing.

67. We may now proceed to speak of the mode in which rights over things are acquired. We find at the outset an obvious difference between acquiring rights over a particular thing and

acquiring rights over the entirety of a number of things comprised in such a term as an inheritance, which includes the entirety of the rights belonging to a deceased person, both over things and against persons. We may thus divide the subject of the acquisition of rights into two parts: the first comprising the modes in which rights are acquired over particular things; the second comprising the modes in which an entirety (*universitas*) of rights, both over things and against persons, passed from one person to another.

Acquisition of rights over things.

68. We may mention, as the first of the modes of acquiring particular things, occupation, i.e. the seizing on a thing which is a *res nullius*, i.e. without an owner: land in an unoccupied country is a *res nullius*, so is a wild animal; if we seize on, or, as we should say, occupy the land, or catch the wild animal, we gain our right over the soil or the animal by having been the first to seize it.

Acquisition of rights over particular things. Occupatio.

69. Accession is the general term for the acquisition of rights either over things which are added by the forces of nature to, and become an inseparable part of, another thing regarded as the principal thing, or over things which by the operation of man are united with other things so as to form an indivisible product. The owner of the principal thing, by virtue of his being owner, is the owner also of the accessory thing.

Accessio.

70. A contract or gift, by which one person promised to give a thing to another, did not make that other the owner of the thing. A further step was necessary. The thing must be handed over to the person who was, under the terms of the contract, to become the owner of it. This handing over was called *traditio* and a perfect *traditio* implied, first, that it was a real absolute owner, capable of alienating the thing, and having the intention of passing the property in it, who transferred it; secondly, that he placed the transferee in actual possession of the thing; and thirdly, that the transferee received it with the intention of holding it as owner.

Tradition.

71. The above are termed natural modes of acquisition; but there are some which are said to derive their force only from the civil law. One is acquisition by gift. Strictly speaking, gift is not a peculiar mode of acquisition, but an acquisition by delivery with a particular motive for the transfer. Probably it was on account of the solemnities with

Gifts.

which under Justinian gifts had to be made that gifts are treated in the Institutes as a special mode of acquisition. One special kind of gift was a *donatio mortis causa*, a gift made in contemplation of death, and to take effect in case of the death of the donor in the lifetime of the recipient.

Usucapio.

72. The law also gave the ownership of a thing by *usucapio*, that is, by quiet possession, *bona fide*, and founded on some mode of acquisition, recognised by law, which sufficed, under the civil law, to transfer the *dominium*, or legal ownership, if maintained during one year over moveable things, or during two years over immoveable. The operation of *usucapio* was of great importance in Roman law; for by it the interest of a person to whom a *res mancipi* was transferred otherwise than by mancipation and the interests of all persons who held things *in bonis* (see sec. 62) were, after a short lapse of time, converted into full Quiritarian ownership. Prescription, before the time of Justinian, was not a means of acquiring rights: it merely gave a means of repelling actions brought to regain rights which had long been held by another than the absolute owner. It was applicable to immoveables in the provinces, they being not affected by *usucapio*, which regarded all moveables, but only such immoveables as were in Italy. Justinian made considerable alterations in the law with respect to acquisition of ownership by length of possession. The same law was made to prevail throughout the empire, and possession during three years gave the ownership of moveables, and possession during ten years, if the parties had inhabited the same province during the time, or possession during twenty years if they had not, gave the ownership of immoveables.

Prescription.

In jure cessio.

73. The ownership was also transferred when things were surrendered by the fictitious process of *in jure cessio*, that is, a suit in which the defendant gave up to the plaintiff all he claimed, or when things were adjudged (*adjudicatio*) in certain actions, such as those for assigning boundaries, and dividing a family estate, when the judge had a power to assign the respective portions to the different parties.

Acquisition of an entirety of rights.

74. The entirety of rights was acquired when one person succeeded to the *persona*, or legal existence, of another, and thereby succeeded to all his rights, whether over things or against persons. The cases in which this most naturally occurred were that of arrogation

(for when a person was arrogated, he, of course, transferred all that he had to the person whose family he entered), and that of succession to the inheritance of testators and intestates.

Arrogation.

75. Testaments were originally made by being proclaimed in the *comitia curiata,* or by a fictitious sale, in which testators transferred their property to a purchaser (*familiæ emptor*) who was himself heir, or who was, after their death, to distribute it according to their wishes. In later times a testament was made in the presence of seven witnesses, who affixed their seals to it, and the witnesses and the testator subscribed the testament. In order to make a testament, it was necessary to have the *testamenti factio,* a term implying such a participation in the law of private Roman citizens as to make a person be considered capable of making, taking under, or being witness to, a testament.

Testaments.

76. The testator was obliged to disinherit by name every one who, being among those in his own power, had a natural claim on his property; and if he failed to do so, the whole testament was set aside. The great peculiarity of a Roman testament was the institution of the heir, that is, of the person who was to succeed to the *persona* of the testator. Unless there was such a person, no other disposition of the testament could take effect, for there was no continuation of the testator's legal existence. The heir was, therefore, properly appointed at the beginning of the testament; in case of the heir accepting, he placed himself exactly in the position of the testator, received all his property, and was answerable for all his debts; in receiving his property he was, however, bound to give effect to the subsequent dispositions of the testament. Various provisions were made at different times to protect the heir, and especially he was secured by the *lex Falcidia* (B.C. 40) in a clear fourth of the inheritance; and under Justinian his position was altogether altered, and he could take the property of the testator apart from his own. In order that the testament might not fail because the heir was not willing to enter on the inheritance, it was customary to name one or more persons to whom in succession it might be open to take upon them the office of heir (*substitutio*). And a testator could always secure an heir by naming, as the last of the list, one of his own slaves, whom the law did not permit to refuse the office (*heres necessarius*). When some of the conditions

Disinheriting.

Institution of the heir.

necessary to create an heir, or give a legacy, were wanting in a will, still the expressions of the testator's wishes were binding as trusts upon the heir under the will, or heir *ab intestato*. Such trusts (*fideicommissa*) were first made obligatory by Augustus, who also first gave effect to codicils, that is, writings purporting to deal with property in the manner of a testamentary disposition, but not executed with the solemnities which were required to make a testament valid.

Fideicommissa.

Codicils.

77. If there was no testament to determine the succession to the particular property, the law prescribed the order in which it was to devolve. The first claimants were the *sui heredes*, that is, all persons in the power of the deceased, and who, on his death, became themselves *sui juris*. Thus, a son *in potestate* was a *suus heres* of the deceased, but not a grandson until the son was dead. These persons were termed *sui heredes* as having an interest of their own in the family property. If there were no *sui heredes*, the next heirs were the *agnati*, i.e. all members of the same civil family; and then, in default of *agnati*, the law of the Twelve Tables gave the inheritance to the members of the same *gens*, an enactment which could of course only take effect when the deceased was a member of a *gens*. What was the course of devolution beyond the *agnati* under the old civil law, when the deceased was not a member of a *gens*, we do not know; but probably the blood-relations succeeded. In default of *agnati*, under the prætorian legislation, the claims of the natural family were attended to, and the *cognati*, or blood-relations, succeeded to the inheritance. In the later times of the Roman law the claims of blood-relations were more and more favoured, and in many important points were gradually preferred to those of merely civil kinship.

Succession to intestates.

The Institutes also notice three other modes of minor importance by which *universitates rerum* were acquired. (1) *Bonorum addictio*, the giving over of the property of a deceased person to a slave to whom the deceased had given his freedom. (2) *Bonorum venditio*, the compulsory sale of the whole property of an insolvent to a person who would undertake to pay most to the creditors. (3) *Ex senatusconsulto Claudiano*, which gave over a woman with all her property, who had cohabited with a slave, to the slave's master.

Other modes of acquiring universitates rerum.

IV. RIGHTS AGAINST PERSONS.

Rights against persons.

78. A personal right is, as we have said before, a right which one person has against another; a right to constrain that other to give something to, or do something for, or make something good to, the possessor of the right. The person to whom the right belonged, and the person against whom it existed, were said in Roman law to be bound by an obligation, the notion of an obligation being that of a tie between two parties of such a nature as to confer on the one a power of compelling by action the other to give, do, or make good something. The obligation did not give any interest in a thing, to get which might be the ultimate object of the proceeding, but only gave a means of acquiring it, or, under the prætorian system, its value.

Dare, facere, præstare.

79. The three words, *dare*, *facere*, *præstare*, were used to embrace all the possible duties an obligation could create. Either the person bound by the obligation was obliged *dare*, i.e. to give the absolute ownership or the possession of a thing; or *facere*, that is, to do or not to do some act; or *præstare*, that is, to make good something, as to make good a loss, or to furnish any advantage or thing, the yielding of which could not be included in the limited sense of the word '*dare*'. Every person who possessed a personal right against another was termed a *creditor*, and every one who owed the satisfaction of a claim, or was the subject of a personal right, was a *debitor*. The word *creditor*, of course, points to those transactions in which the possessor of the right trusted the person who was the subject of it; but the application of the terms was perfectly general, and must not be confounded with the English usage of the words creditor and debtor.

Division of obligations.

80. According to the theory of Roman law, all obligations owed their origin either to the consent of the parties (*contractus*), or to injuries (*delicta*) done by one person to another, which gave the injured party a right to recompense. Contracts did not, however, include all cases, when an obligation arose from the mutual consent of the parties. The general name for such an obligation was *conventio*, *pactum*, *conventum*. A contract was properly an obligation arising by

mutual consent, and made in one of the forms recognised by the civil law; but all obligations arising from mutual consent are spoken of as arising from contracts, because in the old law no other mode of expressing mutual consent was recognised, and mere agreements were not binding.

Nexum.

81. The mode of transferring *res mancipi* was, as we have said in sec. 59, called *mancipatio.* Gaius (i. 119) thus describes the form of transfer of a slave: 'Mancipation is effected in the presence of not less than five witnesses, who must be Roman citizens of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of scales, and hence is called *libripens.* The purchaser, holding in his hand a piece of copper, says: "This slave is mine *ex jure Quiritium*, and he is purchased by me with this piece of copper and these scales" He then strikes the scales with the piece of money, and gives it to the seller as a symbol of the price.' But the generic term for this mode of sale was not *mancipatio*, but *nexum*,* for this form was used not only when a sale was its real object, but when under the form of a sale the parties intended to effect a contract of deposit or pledge. The purchaser took the thing handed over to him upon the condition of restoring it under certain specified circumstances, and thus a form of transfer came to be a form of contract where part of the contract was still to be executed.

Contracts made re.

82. In the time when the civil law had assumed its full shape, and apart from the alterations it received from the prætorian system, the *nexum* was used chiefly as the mode of transferring *res mancipi*, as contracts of deposit and pledge were ordinarily made, as it was termed *re.* That is, by the mere delivery of the thing, the person to whom it was delivered, and who accepted it, was bound by an obligation to hold it for the purposes for which it had been delivered. There were four heads of contracts recognised by the civil law, and this of contracts made *re* is the first noticed in the Institutes, although historically the recognition of such contracts was probably posterior to that of the more formal contracts *verbis* and *litteris.* Under contracts *re* were classed four kinds of contract, namely, the contracts of *mutuum* when the receiver had to return as much of the same kind of the thing he received, *commodatum* when he

* *Nexum est, quodcumque per æs et libram geritur, idque necti dicitur.*—FESTUS.

had to return the specific thing itself, *depositum* when the receiver was bound to keep safe a thing committed to his charge, and *pignus* when the receiver took a thing in pledge.

Contracts made verbis.

83. The second head of contract under the civil law was that of contracts made *verbis*, of executory contracts, that is, made in a prescribed form of solemn words. One of the parties put to the other a formal question (*stipulatio*), to which the other gave a formal answer (*responsio, promissio*). To the validity of the contract it was necessary that the question should be couched in the form '*spondes?*' and the answer in that of '*spondeo*'. Do you engage? I do engage. It was long before equivalent words, such as *promitto* or *dabo*, were admitted as substitutes. A contract made by the pronunciation of these solemn words was said to be made *verbis*.

Contracts made litteris.

84. A third head of contract under the civil law was that of contracts made *litteris*. An engagement having been made to give a definite amount, the parties agreed to make a memorandum of the terms of the contract. The creditor placed in his book of domestic accounts (*tabulæ* or *codex*) the name of the debtor, and the sum as *pecunia expensa lata*, weighed out and given to the debtor; and the debtor entered in his *tabulæ* the same sum as *pecunia accepta relata*. Either party could call on the other to produce his *tabulæ*, which it was considered so incumbent on a Roman citizen to keep carefully and accurately, that any wilful error was discoverable without much difficulty. The debtor, in fact, furnished the creditor with a means of proving that the debtor had on a certain day received the money, and even if the debtor had not set the sum down in his *tabulæ*, the creditor could show his own *tabulæ* as a proof of the contract. These contracts were peculiar to Roman citizens. *Peregrini* had as a substitute *syngraphæ*, signed by both parties, or *chirographa*, signed only by the debtor; and on these documents an action could be brought.

Contracts made consensu.

85. There were, also, four particular contracts, for the formation of which the civil law required no formalities whatever, but which were made merely *consensu*, by the consent of the parties. These four contracts were— sale (*emptio-venditio*), hiring (*locatio-conductio*), partnership (*societas*) and bailment (*mandatum*). The four modes, then, in which contracts might be entered into under the civil law, were —*re*, *verbis*, *litteris*, and *consensu*.

86. When, however, the old law of contracts fell under the manipulation of the prætors, many changes were introduced. The ten forms of contract recognised by the civil law, that is, the four heads of contract made *re*, the four heads of contract made *consensu*, and contracts made *verbis* and *litteris*, still remained the basis of the whole law of contracts; but the prætors, while nominally adhering to the civil law, introduced changes that had a great practical effect. The nature of this change can only be understood by studying the details of the Roman law of contracts, and it would be out of place in a general introduction to attempt to notice them. But there are three ways in which the prætors wrought a change, which were so important that they may be briefly stated here. By an extension of the theory of the civil law contract *re*, the prætors permitted an action to be brought to enforce every contract that was in part executed; secondly, agreements (*pacta*) that would not furnish a cause of action were permitted to be set up by way of defence to an action with which they were inconsistent; and thirdly, there were a few specified particular cases in which the prætor permitted pacts to be enforced by action.

Prætorian innovations.

87. Obligations might, however, very well arise, without any fault on the part of any one, and yet without having their origin in mutual consent. The mere fact of occupying a certain position will sometimes involve duties, the performance of which may be enforced by an action, and which give rise to a personal right which the person interested in their performance has against the person bound to perform them. An heir, for instance, was, by the mere fact of accepting the inheritance, bound to pay the legacies given by the testament. Such obligations were said to be *quasi ex contractu*, not that they really rested on any contract, but there was an analogy between the obligation thus arising and that arising from the formation of a contract.*

Obligations quasi ex contractu.

88. It was not every wrong deed for which compensation could be obtained that gave rise to an obligation *ex delicto*; there were certain particular wrong deeds, such as theft and robbery with violence, which the law expressly characterised as *delicta*, and to procure reparation for which the law provided a special action. It was only when a person suffered by one of these wrong deeds that an obligation *ex delicto* arose.

Obligations ex delicto.

* See Austin, *Jurisprudence* (ed. 1869), p. 944.

When any wrong deed was done not thus expressly designated by law as a *delictum*, and when no particular and appropriate form of action was provided, the obligation was said to arise *quasi ex delicto*. Among the instances given in the Institutes is that of dangerous things being placed so as to fall into a public way. If any one was hurt by the fall, the author of the injury would be bound to make reparation by an obligation *quasi ex delicto*, there being this point of analogy between this obligation and that in the case of a delict, that the person liable to be sued had done harm to the person or property of another. The division of obligations adopted in the Institutes is therefore into those *ex contractu*, those *quasi ex contractu*, those *ex delicto*, and those *quasi ex delicto*.

Obligations quasi ex delicto.

89. The ancient law considered an obligation as existing until the tie of law, the *vinculum juris*, was loosed by the thing being given, furnished, or done, or by a new tie being formed in place of the old; this loosening of the tie was termed *solutio*. If payment was made, i.e. if the contract was carried out, this at once put an end to the contract. But it might happen that the parties wished to put an end to the contract before it was carried out. Each mode of forming a contract by the civil law was accompanied by a corresponding mode of dissolving it. When the contract had been formed *re*, it was enough that the thing should be restored; when it had been formed *verbis*, a question and answer again furnished the means of accomplishing the desired object. *Habesne acceptum? Habeo*, sufficed to put an end to the contract. The parties made an entry of payment in their *codices*, if the contract had been *litteris*; and mutual consent dissolved those contracts which it had sufficed to form. The *solutio verbis* was most frequently employed, and it was easy to employ it on every occasion: for in whatever way the contract might originally have been entered into, its terms could be repeated in the form of a stipulation, and then this stipulation could be dissolved by a *solutio verbis*. The stipulation extinguished the original contract. For contracts were extinguished not only by payment, but by what was called *novatio*: that is, by making a new contract, and substituting it in the place of the original one. The law required that the new contract should be always made *verbis* or *litteris*. When strict adherence to the rule of law, requiring a particular mode of payment, would work injustice, the prætor would always provide a remedy by means of his equitable jurisdiction.

Dissolution of obligations.

Novatio.

V. SYSTEM OF CIVIL PROCESS.

90. An action is the process by which a right is enforced. Unless a means of enforcing it was provided, the right would be a mere inoperative abstraction. Directly it was disputed, it would cease to have any real existence; but in order that it may have a real existence, the State uses its powers to insure a free exercise of it, as soon as it is made certain to the magistrate, who is entrusted with the authority of the State, that the right claimed does really belong to the claimant. The proceeding by which this is made evident to the magistrate, and the machinery set in motion by which the State exerts its power of compulsion, is called an action. The word 'action' is not, however, always used exactly in this sense; for it is also employed to mean sometimes the right * to institute such a proceeding, and sometimes the form which the proceeding takes.

Meaning of the word action.

91. There are three great epochs in the history of the Roman system of civil process. First, that of the system of the *legis actiones*, certain hard, sharply defined forms which a rude civilisation prescribed for all proceedings. Secondly, that of the system of *formulæ*, by which the prætor, adopting a most flexible form of organising the proceedings, was enabled to give a means of enforcing every right which the more enlarged views of an advancing civilisation pronounced to be founded on equity; and thirdly, that of the *extraordinaria judicia,* by which, under the later emperors, the supreme authority took the whole conduct of the proceeding into its own hands, and arrived at what seemed to it to be just in as direct and speedy a manner as it found possible.

Epochs in the history of Roman system of civil process.

92. In enforcing rights two very different functions have to be exercised by those to whom the powers of the State are delegated. First, there must be some one invested with magisterial authority, giving the sanction and solemnity of his position to the whole proceeding, who shall represent the law and say what the law is, and who shall have power to employ the force which the State places at the disposal of those it selects to administer justice. Secondly, an inquiry has

The magistrate and the judge.

* *Inst.* iv. 6. pr.

to be made into particular facts, evidence has to be received and weighed, and an opinion formed and pronounced as to the real merits of the case. The person who exercised the one function was spoken of by the Romans as *magistratus;* the person who exercised the other as *judex.* To the law, represented, pronounced, vindicated, by the magistrate, they applied the term *jus;* to the examination of contested facts by the judge, the term *judicium.* It is perfectly possible that the same person should act as magistrate and judge; but it is also possible that the two provinces should be separated and placed in the hands of different persons. Among the Romans the *magistratus* was a different person from the *judex,* until the introduction of the system of *extraordinaria judicia.* The two functions were kept almost entirely apart under the system of *formulæ,* and, from a comparatively early period of Roman history, the notion of a judge distinct from the magistrate was familiar to the national mind. After the expulsion of the kings, and during the time of the first period of the system of civil process, first the consuls, then the *prætor urbanus,* and in some cases the *ædiles,* acted as the magistrate, and the magistrate was said to have two functions, (1) *Jurisdictio,* the elements of which were summed up in the three solemn words by which the *prætor* announced that he was exercising his authority on one of the *dies fasti,* when alone legal business could be done (Ov. *Fast.* i. 47): *do,* I give an action or possession of goods; *dico,* I express the law, issue edicts or interdicts; *addico,* I give ownership; and (2) *Imperium,* the power of using the public forces to insure obedience to his orders. As *judex,* any member of the senatorial body, so long as senators alone were qualified to act as judges, could act who was chosen by the mutual consent of the parties: if they could not agree, the choice was determined by lot. There was also a standing body of plebeian judges dating from a remote antiquity, the *centumvirs,* elected annually by the *comitia,* three from each local tribe, and constituting a *collegium* divided into sections. They had special jurisdiction over questions of *status,* of *dominium ex jure Quiritium,* and of successions, and a spear (*hasta*), the special symbol of Quiritian ownership, was set up in front of the place where they met. In cases involving any question into which the *centumvirs* were the proper persons to inquire, it was not open to the parties to ask for a judge, and the whole proceedings were carried on before the *centumvirs.* Lastly, in cases where the interests of *peregrini,* and afterwards even where the interests of

citizens, were involved, *recuperatores*, i.e. persons not on any list, were invited to act, and, so acting, furnished the body who were to act the part of the *judex*. It may be added that where the circumstances of the case demanded that the judge, in pronouncing his opinion on the facts, should exercise a wider discretion than was ordinarily open to him, or decide from special knowledge, he was spoken of as an *arbiter;* and although there could never be more than one *judex*, there were sometimes several *arbitri*, but the *arbiter* was chosen from the same class as the *judex*.

Arbiters.

93. All judicial proceedings, whether before a magistrate or a judge, were conducted publicly at Rome. The proceedings began with the *in jus vocatio*, or summons to come before the magistrate. If the adversary would not come, the summoner called, by touching them on the ear, bystanders to witness that he had made the summons; but ascendants and patrons could not be summoned except by previous authorisation of the magistrate. When before the magistrate the parties had to give security for their further appearance (*vadimonium*), and called witnesses to testify that the litigation had duly begun (*litis contestatio*). In early times, the magistrate sat in the *forum*, and openly dispensed justice to all comers. Nothing, perhaps, conveys a more correct picture of the ideas and feelings that lay at the bottom of the public life of a Roman citizen, while Rome was still the rival of the Volscians or the Æquians, than the mode in which the actions of law were conducted. The magistrate and the judge of the patrician order, the distinction of days *fasti* and *nefasti*, the key to which only those who knew the *jus sacrum* possessed, the solemn and indispensable form of words by which every stage of the proceeding must be accompanied, would throw over the conduct of the action much of the same character which the existence of a privileged and partly sacerdotal order impressed on the whole body politic.

Character of judicial proceedings at Rome in early times.

94. The most ancient and most important of the actions of law, the *actio sacramenti*,* brings before us, in the most marked manner, the delight in appeals to the external senses, and the use of symbolical acts, sanctioned by long usage and expressive in themselves, which belongs to the early times of so many nations. It was originally the

First epoch. Actions of law —actio sacramenti.

* Gaius, iv. 13-17.

only form of action; and every species of right could be enforced by it. When it was employed to enforce a right over things, the proceedings opened by the thing being brought before the magistrate (*in jure*); the claimants appeared, each touched it with a rod (*vindicta* or *festuca*), and said, '*Hunc ego hominem* (the instance given in Gaius is that of a claim to a slave) *ex jure Quiritium meum esse aio secundum suam causam, sicut dixi. Ecce tibi vindictam imposui.*' His adversary repeated the same words. At the same time that the words were spoken each party seized hold of the thing claimed; this was termed the *manuum consertio*, representing a combat which was supposed to take place in the presence of the magistrate before he would interpose, and the imposing the rod was termed *vindicatio*. If the thing was one that could not be brought into court, a portion of it was brought to represent the whole. A piece of turf, a twig, a brick, or one sheep, stood in place of a field, a house, or a flock.* When the *vindicatio* and *manuum consertio* were over, the magistrate said to the parties, *mittite ambo hominem;* both were to place their claims in his hands. Then came the wager, the *sacramentum*, each party challenging his adversary to deposit a certain sum, which the loser of the cause was to forfeit to the treasury of the people (*ærarium*), to be applied to the expenses of sacrifices. The law of the Twelve Tables fixed the amount of the wager at 500 or 50 *asses*, according as the value of the thing contested fell above or below 1000 *asses*. The formal words by which this was done are thus given by Gaius He who had first gone through the *vindicatio* asked his adversary why he claimed it. *Postulo anne dicas, qua ex causa vindicaveris.* The other replied that it was in conformity with right and law that he had made his claim. *Jus peregi sicut vindictam imposui:* the first answered, *Quando tu injuria vindicasti, D. æris sacramento te provoco*, 'I challenge you to a deposit of 500 *asses*'; and the other accepted the challenge by saying, *Similiter ego te.* The magistrate then awarded the possession of the thing contested, until a decision was pronounced, to the party that appeared to have the best right to it, requiring him to furnish security that it would be forthcoming at the proper time. These sureties were

* If the thing was an immoveable, there appears to have been an old ceremony of the parties going to the land or other immoveable thing, and one expelling the other from it, and leading him before a magistrate (*deductio*). See AULUS GELLIUS, *Noct. Att.* xx. 10; CICERO, *Pro Muræna*, c. 12.

called *prœdes litis et vindiciarum*—*lis* signifying the thing contested itself, and *vindiciæ* the fruits or profits which might arise from it before the final sentence was given. After a certain delay, a judge was appointed to examine the facts; he informed the magistrate what his decision was, and the magistrate gave effect to this decision by using the force placed at his disposal. When the right to be tried was a personal one, there was of course nothing that could be claimed by *vindicatio*, and the action began at once with the wager.

Actio per judicis postulationem.

95. The details of the *actio sacramenti* furnish so lively a picture of the actual working of early Roman law, that it is worth while to set them fully before us; but the other actions of law may be passed over with a much more cursory notice; * indeed, our knowledge of them is very deficient, as the portion of the manuscript of Gaius which contained a sketch of the proceedings is imperfect. Perhaps the action called *judicis postulatio* was employed in complicated cases, e.g. where the rights of several persons to a common object had to be settled, as in the settlement of boundaries (see sec. 103); the machinery of the *actio sacramenti* being obviously but very ill adapted for enforcing rights of this kind. We know little more than that the magistrate was asked to allow the appointment of a judge, or *arbiter*, to decide the matter in question; and that the form of action was probably adopted, not where some certain thing was asked for as the fulfilment of the engagement, but where a greater uncertainty in the circumstances of the case allowed a greater latitude of opinion, and where an appearance of good or bad faith would naturally colour the whole cause. † In the year B.C. 243 (as it is conjectured) the *lex Silia* instituted a new form of action where the obligation was for the giving a definite sum of money, and a *lex Calpurnia* (B.C. 233) extended the scope of the action to all obligations for any certain definite thing. ‡ This action was called *condictio*, because the plaintiff gave notice (*condicere*) to the defendant that he must appear before the magistrate, at an interval of thirty days, to receive a judge. Probably its institution completed the withdrawal of the enforcement of obligations from the scope of the

Condictio.

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* GAIUS, iv. 12.

† *Præclarum a majoribus accepimus morem rogandi judicis, si eum teneremus, quæ salva fide facere posset.*—CICERO. *De Off.* iii. 10.

‡ GAIUS, iv. 19.

actio sacramenti. The *judicis postulatio* may have left to the sphere of the *actio sacramenti* the demand for things *certi*, and then the *condictio* took that also away.

Actio per manus injectionem.

96. There were two other actions of law, that *per manus injectionem*, and that *per pignoris capionem.** These were, however, not really actions so much as methods of obtaining execution. If it was a right over a thing that was claimed, then, if the sentence was in favour of the claimant, the magistrate at once put the claimant in possession of the thing, having recourse to force, *manus militaris*, if necessary. But when a right against a person had to be enforced, there was nothing which could be thus handed over; the remedy was against the person, the liberty of the defeated adversary, and the action *per manus injectionem* was the means by which the successful litigant exerted his power. He laid hands on him, *manus injecit*, and brought him before a magistrate, stating that he had been cast in the previous suit; if this was denied, a *judex* was appointed, and inquiry made whether judgment had really been given against him as alleged. If this was found to be the case, he was *adjudicatus* to the claimant, who kept him prisoner, and then being brought, after sixty days, before the magistrate, was *addictus*, or assigned over, and became the slave of his creditor.

Actio per pignoris capionem.

To the principle that the person, and not the property, of the debtor was bound, an exception was made when the debt was due to a soldier for military service, to the fund for sacrifices, or the public treasury.† The creditor, in such cases, might seize on anything belonging to the debtor, and take it as a pledge for the payment of a debt. This *pignoris capio* was only spoken of as an *actio* because it was conducted with certain solemnities, and accompanied by the repetition of a peculiar form of words.

The following are some of the marked features of actions of law, in respect of which great differences were gradually introduced under the later systems. (1) The procedure in the actions of law was one open only to Roman citizens. (2) The parties were almost always obliged to appear personally, but an *assertor libertatis* could appear to claim the freedom of a person wrongly treated as a slave. (3) So rigid was the necessity of adherence to the prescribed forms, as Gaius informs us (iv. 11), that if, in an action

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* Gaius, iv. 21-25.

† Gaius, iv. 26-29. (See also ante, sec. 8.)

for damage to a vineyard, the plaintiff used the word *vites* instead of the general word *arbores*, employed in the law of the Twelve Tables, he lost his action. (4) If the action was once brought, it was exhausted, or if it failed, even on the most technical ground, the plaintiff had no further remedy. (5) The sentence was ordinarily to give the thing demanded, not a pecuniary equivalent.

Suppression of the actions of law.

97. The *legis actiones* were necessarily replaced by other forms of actions more convenient as Rome advanced in civilisation. They were in a great measure suppressed by the *lex Æbutia* (about B.C. 180), and afterwards, in the time of Augustus, by the *leges Juliæ*. They were, however, long retained in cases where the *centumviri* were the proper *judices*, that is, in questions of *status*, Quiritian ownership, and disputed succession, the *prætor* presiding personally over the deliberations of the *centumviri*, and not instructing them by a formula; and a fictitious process, termed *in jure cessio*, which was nothing else than an undefended action at law, in which a disputant gave up (*cessit*) before the magistrate (*in jure*) the thing in dispute, was retained as a ready means of many legal changes, such as manumission or adoption, long after the actions of law had fallen into disuse. Before the actions of law were suppressed, the *prætor peregrinus* had for years been administering justice through forms of action devised by him where *peregrini* were concerned.

Second epoch. The system of formulæ.

Judges in the second period.

98. The changes wrought by intercourse with foreign nations, the new duties of extended dominion, and the stimulus given to the national mind by the long internal struggles which had now subsided, produced by degrees a general change in the mode in which justice was administered. A new system succeeded the old *legis actiones*; the magistrate was more strongly marked off from the *judex*, and it was the directions which the former gave the latter that constituted the important feature of the new system of procedure. At home the prætors, of whom there were eighteen in the days of Pomponius,* and one or two other magistrates; and in the provinces the *præsides* or præfects, who held *conventus* or assizes in the principal towns at stated intervals, sat as magistrates. At Rome the long struggle between the senate and the *equites* for the exclusive right to furnish the judges ended, as has been already

* D. i. 2. 2. 34.

said (sec. 12), in the judges ceasing to be taken entirely either from the senate or the *equites;* and two, at least, out of the five decuries of judges appearing in the *album* were taken from a comparatively humble class. The *recuperatores* and *centumviri* still continued to act in the cases which properly fell within their province.

Formulæ.

99. The directions which the magistrate sent to the judge were always conveyed in a formal shape, and the word *formulæ* was used to express the different forms in which directions were given. These *formulæ* were preserved and collected, and it became the great object of the contending parties that the right *formula* should be used in their case, the judge not being allowed to depart from the instructions he received. As there was no legal form to bind the magistrate, he could easily vary the formula so as to render substantial justice, and had thus a ready means of availing himself of any equitable doctrine, which a more refined jurisprudence or his own sense of what was right suggested to him. These *formulæ,* so flexible in their general character, yet couched in terms always precise and simple, furnish one of the many admirable instances of the power of the Romans to express correctly the subtlest legal ideas; and it was by this machinery that the prætors principally introduced their great legal changes. But it may be observed that, although the old actions of law became obsolete, traces of them are to be found in the prætorian system. Thus, in certain actions the parties entered into a wager, *sponsio pœnalis,* evidently a relic of the old *actio sacramenti,* by which each stipulated with the other for a sum of money to be paid as a penalty by the loser in the action to the successful party.

Example of a formula.

100. To show what these *formulæ* were, it will perhaps be best to give at length one of those we find in Gaius, and then to explain its different parts. One which we may collect from different sections of the Fourth Book runs thus:—

*Judex esto: Quod Aulus Agerius Numerio Negidio hominem vendidit; si paret Numerium Negidium Aulo Agerio sestertium X. millia dare oportere, judex Numerium Negidium Aulo Agerio sestertium X. millia condemna; si non paret, absolve.**

Judex esto is merely the order for the appointment of the

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* GAIUS, iv. 40-43

judge, and is not, strictly speaking, a part of the *formula*. From '*quod*' to '*vendidit*' is what is called the *demonstratio*; from '*si paret*' to '*dare oportere*' is the *intentio*; and from '*judex*' to the end is the *condemnatio*. The *formula* ordinarily consisted of these three parts—the *demonstratio*, the *intentio*, and the *condemnatio*.

Demonstratio.

101. The *demonstratio* is the statement of the fact or facts which the plaintiff alleges as the ground of his case.* Aulus Agerius, the plaintiff, says that he has sold a slave to Numerius Negidius. The *demonstratio* varied, of course, with each particular case.

Intentio.

102. The *intentio* was the really important part of the *formula*.† It was a precise statement of the demand which the plaintiff made against (*tendebat in*) his adversary. It was necessary that it should exactly meet the law which would govern the facts alleged by the plaintiff, if true. Whether Aulus Agerius has sold this slave to Numerius Negidius at the price he alleges, and whether the debt is still owing, this is what the *judex* has to determine; if the judge thinks he has (*si paret*), then the judge is instructed to pronounce his judgment against him; if he thinks he has not (*si non paret*), he is to be absolved.

Condemnatio.

103. The *condemnatio* is the direction to condemn or absolve according to the true circumstances of the case.‡ The *judex* was only a private citizen, and, unless specially authorised by a magistrate, could have no power to pronounce a judicial sentence. It is to be observed that the *condemnatio* was, under the formulary system, always pecuniary; the judge was always directed to condemn to a payment of money, never to do or give a particular thing. In three particular actions, however, and perhaps in more, the judge was directed to 'adjudicate' a thing, in the sense of dividing it out among several litigants. These three actions were those brought to divide a family inheritance, to divide property held in common, and to settle boundaries. In these actions there was a part of the *formula* running thus: *quantum adjudicari oportet, judex Titio adjudicato.* This was called the *adjudicatio*; so that in these actions the parts of the *formulæ* might be four—*demonstratio, intentio, adjudicatio,* and *condemnatio*.§ Of course when a thing, and not a sum of money,

* GAIUS, iv. 40. † GAIUS, iv. 41. ‡ GAIUS, iv. 43.

§ The judge might think it right, in order to equalise the division, to

was claimed, it was not possible for the magistrate always to fix a precise sum in which the defendant was to be condemned. Sometimes, therefore, the *condemnatio* merely fixed a maximum sum, and ran *duntaxat X. millia condemna.* Sometimes the direction was still more indefinite, and the sum was left to the discretion of the judge. *Quanti ea res erit, tantam pecuniam, &c., condemna.* Sometimes, too, as when the action was real, i.e. brought to claim a thing, the *actio* was *arbitraria*, and the words *nisi restituat* were inserted in the *condemnatio*. The defendant was ordered to give up the thing, and then was condemned to pay the money if he did not restore the thing, in accordance with the order (*arbitrium*) of the judge, or if the thing was in his possession, he was forced to give it up.

Præjudicialis formula.

104. The *intentio* sometimes stood quite alone, as in what was called a *præjudicialis formula;** when the object of the action was merely to establish a point which it was necessary to have settled with a view to a future action. The decision of such a preliminary point was called a *præjudicium.* Of course the *intentio* took any form that best suited the case; and accordingly it was the *intentiones* that were so carefully preserved as precedents, and so keenly debated by the contending parties. Sometimes the grounds of the defence made part of the *intentio*. The defendant might admit the plaintiff's statement, but say that there were special circumstances to take this particular case out of the general rule of law under which it would naturally fall. He might own, for instance, that he had bought a slave at the price alleged, but say that he had been induced to do so by fraud. This plea was called an *exceptio* (i.e. a taking out), and was made to form part of the *intentio*, some such words as these being added: *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat.* The plaintiff, again, might have something to urge as an exception in reply to this plea: his answer was called *replicatio;* if the defendant had a further answer, it was called a *duplicatio*, the plaintiff's further reply a *triplicatio*, and so on. There was also sometimes an accessory part of the *formula* called the *præscriptio*, placed, as its name denotes, at the beginning of the whole *formula* for the purpose of limiting the inquiry. As employed by the defendant, it answered the purpose of the *exceptio*, and belongs, probably, to

Exceptio.

Replicatio.

order that some of the parties should, in receiving their share, make a money payment to others, and for this there would be a *condemnatio*.

* GAIUS, iv. 44, 133.

a time before the *exceptio* had its regular place in the *formula*. A well-known example of its use is that by which the defendant stopped an action for the possession of provincial lands, by raising the question whether he had not been in possession for a particular period, which is the origin of the familiar term 'prescription'. (See sec. 72.) But the plaintiff also might, in the early days of the formulary system, have occasion to resort to a *præscriptio*. He might, for instance, wish that, in enforcing a security on which payments were due from time to time, the action brought to try whether this security was valid should only affect his claim to payments already due, so that if he failed he might have a further action for future payments. In such a case some such words as *ea res agatur cujus rei dies fuit* (let the inquiry only be made as to the sum for the payment of which the time has arrived) were prefixed to the *formula*. Gradually, however, the *præscriptio* fell into disuse, and the *intentio* and *exceptio* were so constructed as to serve every purpose for which it had been employed.

105. In the Roman system of civil process the time when a contested right was to be considered as really made the subject of litigation, was very carefully marked. *Litis contestatio.* It was very necessary that this should be clearly ascertained. The claimant in whose favour the ultimate decision was given was entitled to all that accrued to the thing claimed from this moment; and when once a point had been submitted to litigation, it could not be again litigated, both parties surrendering all their interest into the hands of the court, which assigned to the successful claimant such a fresh interest in the thing claimed as might appear to be due to him. This time was marked by each party, at the end of the proceedings before the magistrate, calling bystanders to witness that they submitted the matter to the decision of the judge.* This was called the *litis contestatio*, as has been said. (See sec. 93.) In process of time the ceremony might be omitted, or at any rate become a mere form, but the conclusion of the proceedings before the magistrate (*in jure*), i.e. in the formulary system, the time when the prætor delivered the *formula*, still formed the crisis at which the claims of the different parties were considered to be finally submitted to the decision of the law. Up to the *litis contestatio*, the proceedings in an action under the formulary system were as follows. The plaintiff applied to the prætor for a summons to make the

* Festus, *sub voce Contestari*.

defendant appear (*in jus vocatio*). If the defendant on appearing would not come to any compromise (*transactio*), the plaintiff announced that he would go on with legal proceedings. This was termed *edere actionem*. He had to announce the kind of action to which he proposed to resort. He then called on the defendant to give bail (*vadari*) that he would appear in court. The plaintiff on the day fixed submitted the *formula* as he thought it ought to be drawn up; the defendant proposed the exceptions on which he relied, and the prætor settled it. The plaintiff then asked for a judge (*postulatio judicis*), and when the prætor gave the judge the *litis contestatio* took place, and the proceedings *in jure* were finished.*

Meaning of the word action under the system of formulæ.

106. *Actio* meant, under the system of the actions of law, a particular form of procedure; under that of the *formulæ*, it meant the right granted to a plaintiff by the magistrate to seek what was due to him before a judge. Sometimes, however, the *formula* by which the judge was to determine the right, and sometimes the *judicium*, the proceedings by which the judge determined the right, were spoken of as if *formula*, *judicium*, and *actio* were synonymous terms. Of the divisions under which the formulary actions may be grouped, the following were the most important. 1. The first division turns on the difference in the nature of the thing claimed, and, according to this division, actions were *in rem* and *in personam*. If the object of the proceedings was to enforce a right to a thing, then the *formula* ran *si paret hominem Auli Agerii esse;* if to enforce an obligation, then the *formula* ran *si paret Numerium Negidium Aulo Agerio dare, facere, præstare oportere;* and it was according to this difference in the *intentio* that actions were said to be *in rem* or *in personam*. *Vindicatio* came to be used as a generic term for actions *in rem*, and *condictio* for actions *in personam*. 2. Another division of action refers to the modes in which the prætor extended or modified the law by the shape he gave to the *formula*. In shaping actions, the prætor introduced changes of two kinds: First, he gave actions for the enforcement of rights outside the old civil law, and this he principally effected by giving an *actio in factum concepta*, in which the *demonstratio* and *intentio* were blended, and the prætor directed that, if a given state of facts was found to be true, the defendant was to be con-

Divisions of actions.

* See note in Appendix (page 453) to Abdy and Walker's *Gaius*.

demned, the action being thus contrasted with one *in jus concepta*, i.e. given to try an issue by the rules of law. Secondly, the prætor extended existing actions (*actiones directæ*) by giving actions (*actiones utiles*) to suit cases and persons outside the limits of the direct actions; and this he did either by means of actions *in factum*, which could be used for these purposes equally well as to give new remedies, or by giving a fictitious action, i.e. an action in which the plaintiff was allowed to feign that he was within the scope of the unextended action. When there was a contract not falling under the old heads, but executed on one side, the prætor enforced it by an action *in factum præscriptis verbis*, an action to meet the case with the circumstances set forth at the beginning; but such an action, as it was to try an issue according to known rules of law, was *in jus concepta*. 3. A further division depended on the varying amount of latitude given to the judge. The actions depending on the old civil law were *stricti juris*, and the judge had merely to decide the question submitted to him, without taking into account considerations of equity. Other actions were *bonæ fidei*, i.e. the judges were allowed to take such considerations into account. In real actions, and in some few special actions, the judge had always a particular kind of latitude given him, as the action was *arbitraria* (see sec. 103), i.e. he could order the thing claimed to be given up, and, if it was not, could condemn the defendant in as much as he thought equitable; and if the thing was in the possession of the defendant, he was made to give it up. Among personal actions which were *arbitrariæ* was one termed *ad exhibendum*, which was used in order to make a person in possession of a thing produce it, so that its existence in his hands and the state in which it was might be ascertained, or pay damages for not so producing it.

Interdicts.

107. In connection with actions under the system of *formulæ* we have to notice the interdicts of the prætor.* An interdict was an order issued by the prætor, and was in fact an edict addressed to some person or persons with reference to a particular thing. *Vim fieri veto, exhibeas, restituas*, 'I forbid you to have recourse to violence; you are to produce, you are to restore;' such were the forms in which these commands were couched. Interdicts were granted where some danger was apprehended, or some injury was being done to something to which a public character attached, as, for instance, if a road was stopped

* Gaius, iv. 138-170.

up; but they were also granted to protect private interests, and especially to protect or regulate possession. If the person to whom the interdict was addressed acquiesced and obeyed the prætor's injunction, nothing remained to be done; but if he refused to obey, the magistrate then referred to the decision of a judge, whether the terms of the interdict ought to be complied with. For instance, an interdict ordering a thing to be restored might have been issued; but the person to whom it was directed might deny that by law he was bound to restore the thing. On his stating this to the magistrate, the magistrate would give an action to try the question, shaping the terms of the interdict into the *intentio* of the formula, *si paret A. A. rem restituere oportere*, &c. And it is thus that interdicts are connected with actions, as their validity depended on no action being brought to contest them, or the result of an action being to support them. Gradually the action superseded the interdict, which was no longer used as a preliminary step, and, by the time of Justinian, the interdict had become obsolete.

Extraordinaria judicia.

108. There were under the system of *formulæ* certain cases which the magistrate decided without sending to a judge. In these cases the magistrate was said *extra ordinem cognoscere*, and the proceedings were termed *extra ordinem cognitiones, judicia*, or *actiones*. Among the cases in which the magistrate proceeded in a summary way, were *restitutiones in integrum* (that is, certain cases in which he restored a person suffering from something from which he ought not by law to suffer, to the same position as he had occupied before the injury was sustained), and cases relating to *fideicommissa*. But he was called upon most frequently to proceed in this way in order to give execution to the sentence of a judge. The proper remedy of the creditors was still against the person of the debtor until a *lex Julia*, probably of the time of Augustus,* permitted a debtor to avoid arrest by giving up all his goods (*cessio bonorum*). If, however, the debtor could not be found, then the prætor protected the creditors by what was termed a *venditio bonorum* or compulsory sale. The creditors were placed in full possession of all that the debtor had belonging to him; his *persona* was, in fact, transferred to them. This was termed the *missio in bonorum possessionem*. After a certain delay, the creditors sold their interest in the debtor's property to the person

Execution.

* Gaius, iii. 78.

who would offer to pay the largest proportion of the sums they claimed. He became the purchaser, and this *emptio bonorum* transferred to him the *persona*, or legal existence, of the debtor, who thereby suffered a *capitis deminutio*, and became, in the language of the law, 'infamous'. It was in the exercise of his 'extraordinary' jurisdiction that the magistrate gave this mode of execution.

Appeals.

In the times of the Republic there was no fixed tribunal of appeal, but the authority of one magistrate might be suspended by the veto of another magistrate. Under the empire the emperor acted as a supreme judge whenever he chose to interfere; but Hadrian ordered that appeals might be brought to the Senate, and that the decision of the Senate should be final.

Third period of the Roman system of civil process. The extraordinaria judicia.

109. In the third period of the Roman system of civil process, the period of *extraordinaria judicia,* his summary jurisdiction was the only jurisdiction the magistrate exercised. There was no longer any distinction between *jus* and *judicium;* the magistrate and the judge were the same person, so that in the language of the Institutes *judex* means a magistrate deciding a cause. By a constitution published A.D. 294, Diocletian directed all magistrates in the provinces to decide causes themselves. The practice was, in course of time, extended throughout the whole of the empire; and in the days of Justinian it was possible to speak of the *ordinaria judicia* as quite obsolete.*

Judges.

110. In the days of the later emperors, the provinces were classed together into præfectures. Over each province was a *præses*, who had a *vicarius*, or vice-president, under him, and who, either himself or by his *vicarius*, tried all cases above a certain amount, fixed by Justinian at 300 *solidi;* cases below that amount were tried by inferior judges, called *judices pedanei,* or by the *defensores* of provincial towns. The great cities, such as Constantinople and Alexandria, were under a separate jurisdiction. The prætorian præfect was the head judge of appeal.

Mode of procedure.

111. Under the system of *extraordinaria judicia,* an action was begun by the plaintiff announcing to a magistrate that he wished to bring an action, and furnishing a short statement of his case. No written statement was necessary,

* *Inst.* iv. 15. 8.

but one was often made, and then this statement, called the *libellus conventionis*, was sent by a bailiff of the court (*viator*, *executor*) to the defendant. The parties or their procurators appeared before the magistrate, and the magistrate decided the case. *Exceptio* was still used as the term to express the plea of the defendant, which he often, but not necessarily, reduced to writing. There was no marked stage in the proceedings, like the conclusion of the proceedings *in jure* under the formulary system, to show when the action had really begun. But the beginning of the action, to describe which the term *litis contestatio* was still used, was said to take place when the magistrate had heard the plaintiff open his case, at the time when, all preliminaries having been gone through, the real hearing began. The condemnation was no longer merely a pecuniary one, and the judge gave sentence for the thing asked for, and not for its equivalent. Constantine had abolished imprisonment for debt unless the debtor could pay, but would not. But already, before the system of *extraordinaria judicia* began, in the time of Antoninus Pius, the simple process of levying executions on so much of the debtor's property as was requisite had been introduced.

Evidence.

So many of the rules of Roman law relating to evidence which are known to us, date from the period in which the *extraordinaria judicia* prevailed, that it may be convenient to give here a brief statement of what the chief of these rules were. Written evidence was not, as a rule, necessary, but when existing was alone admissible, unless the writing was lost. Two witnesses were necessary to prove a fact, and among those who could be witnesses great consideration was paid to the relative character and position of witnesses. But many persons could not be witnesses, such as persons below the age of puberty, criminals, women guilty of adultery, and, under Justinian, pagans, and some heretics. Slaves could only be admitted to complete other testimony. The parties to the suit and their near relations were excluded. The burden of proof rested, as a rule, on him who would fail if no evidence was given, and therefore on him who affirms, not on him who denies. Legal presumptions (*præsumptiones juris*) were recognised, such as that a formal transaction like emancipation has been properly carried through. Witnesses were made to appear by summons from the judge, and were put on their oath. The torture of slaves, even in civil cases, if they were supposed to be keeping back material evidence, was a very ancient practice, and appears to have

been recognised in the time of Justinian. Each of the parties was put on his oath that he was not bringing or defending the action except on grounds that he believed to be good, and in the last resort either party could, as it were, compromise the action by challenging the other to swear to the true state of the facts, and was then bound by what was so deposed. Justinian also enacted that the costs, according to a fixed scale, should be determined by the oath of the successful litigant; and the advocates of the parties had to take a preliminary oath that they would not pervert justice.*

Oaths.

112. Although the subject of crimes and criminal procedure does not fall properly within the scope of the Institutes, which is a treatise on Private Law, yet as the subject is slightly noticed at the end of the Institutes and is connected with the general history of Roman law, it may be convenient to give some slight account of it here. Criminal jurisdiction was under the kings an attribute of the king himself, but there was an appeal in capital cases to the *comitia curiata*. After the establishment of the republic the *comitia centuriata* alone could judge capital cases. The *comitia tributa* exercised a criminal jurisdiction (but without the power of inflicting death) for political offences, such as those committed by a magistrate during his year of office. Before both these *comitia* the accusation had to be made by the presiding magistrate. The senate also exercised a special power of judging offenders in times of public danger, and sometimes under such circumstances inflicted death as punishment, but it did not properly belong to the senate to deal with capital cases, and the senate also exercised an ordinary jurisdiction and dealt with such crimes as it thought proper to notice. But all these authorities, the king, the *comitia*, and the senate, while they sometimes discharged themselves the functions of the judge, were in the habit of delegating their powers to others charged to make an investigation (*quæstio*) of the crime. At first each *delegatio* was made to try one particular offence, and when the case had been tried the *quæstio* was at an end. These *quæstiones*, the term being transferred from the inquiry to the persons making it, were subsequently appointed to try all offences of a particular kind that it might be necessary to inquire into, while the delegated persons held their authority. Lastly, the *quæstiones* began to be made *perpetuæ*, the first of these being probably the *quæstio pecuniæ repetundæ*

Crimes.

* Hunter, 844, 858, 869, 889.

established by the *lex Calpurnia* (B.C. 233), and this change was accompanied by the introduction of something like a body of criminal law. When a *quæstio* was made *perpetua*, the crimes it was to try were in some degree defined, and the punishment prescribed; whereas previously, the body exercising criminal jurisdiction or its delegates had been bound by no rules of law as to the nature of the crime or its punishment, except that the *comitia centuriata* could alone inflict death. Each *quæstio* consisted of a number of judges varying according to the regulations laid down in the law creating it; sometimes of thirty-two, or of fifty, or of a hundred—the judges being appointed for a year and taken from the same list as that from which judges in civil suits were selected, so that the history of the contests between the senatorial and equestrian orders for the right of being judges already referred to (see sec. 12) applies to criminal and civil judges equally. Before the *quæstiones perpetuæ* any citizen might be an accuser. He had to swear that his charge was not false, and he had to prove the guilt of the accused—so that the system under which a criminal trial is regarded as a suit between parties was thus introduced into Roman law. Private persons had from an early time of Roman law recovered penalties in a civil action for delicts committed to their injury, and so, too, the criminal proceeding took the form of an action between the private person accusing and the accused. The judges were under the guidance of a president (*præses*), and each judge pronounced that he condemned, absolved, or that there was not proof either way, by dropping into an urn one of three tablets, bearing respectively the words *condemno*, *absolvo*, *non liquet*. If the accused was condemned, he received the precise punishment provided by the law creating the *quæstio perpetua*. During the last century of the republic, and in the early days of the empire, a great number of laws, each handing over a special head of offence to a *quæstio perpetua*, were passed, and thus something like a system of criminal law and criminal procedure was established. Under the empire, as time went on, exactly what happened in civil suits happened in criminal proceedings. The magistrates had exercised a power of dealing with some offences in a summary manner (*extra ordinem*), and the sphere of their authority was gradually enlarged until it superseded the *quæstiones perpetuæ* altogether, as the formulary system of actions was superseded by the extraordinary jurisdiction of the magistrate in civil suits.

LIST OF THE CHIEF LAWS, EVENTS, ETC.,

REFERRED TO IN THIS WORK.

NOTE.—*Most of the dates both here and throughout the work are merely approximate.*

B.C.		B.C.	
		753–509	THE REGAL PERIOD.
			Comitia curiata and the Senate the earliest legislative bodies.
			Division of the people into classes and centuries; *comitia centuriata*.
	Leges regiæ.		*Jus Papirianum.*
		509–30	THE REPUBLIC.
508	*Lex Valeria.*	493	Recognition of tribunes of the *plebs*.
493	*Leges sacræ.*	488	First meeting of *comitia tributa*.
450	The Twelve Tables.		
449	*Lex Valeria Horatia.*		*Legis actiones.*
444	*Lex Canuleia.*		
		366	A plebeian appointed consul.
341	*Lex Genucia.*		
339	*Lex Publilia.*		
326	*Lex Pœtelia Papiria.*		
		303	*Jus Flavianum.*
287	*Lex Hortensia.*	284	Distinction between *populus* and *plebs* disappears.
286	*Lex Aquilia.*		
		246	*Prætor peregrinus.*
243	*Lex Silia.*		
233	*Lex Calpurnia.*		
197	*Lex Atinia.*		
196	*Lex Atilia.*		
193	*Lex Cincia.*		
183	*Lex Plætoria.*		*Jus Ælianum* or *tripertitum.*
182	*Lex Furia* (*testamentaria*).		
180	*Lex Æbutia.*		The formulary system.
169	*Lex Voconia.*		Influence of Greek philosophy.
123	*Lex Sempronia.*	148	*Quæstiones perpetuæ.*
102	*Lex Apuleia.*		
95	*Lex Furia* (*de sponsu*).		
89	*Lex Plautia.*		
81	*Leges Corneliæ.*		
52	*Lex Pompeia* (*de parricidiis*).		Quintus Mucius Scævola.
			Caius Aquilius Galla.
			Servius Sulpicius.
40	*Lex Falcidia.*		
	Lex Hostilia.		
	Lex Publilia (*de sponsu*)		

B.C.
33 *Lex Scribonia.*
Leges Juliæ.
Legal effect given to *fideicommissa* and codicils.

A.D.
4 *Lex Ælia Sentia.*
8 *Lex Furia Caninia.*
9 *Lex Papia Poppæa.*
11 *Lex Junia Velleia.*
16 *Sc. Libonianum.*
19 *Lex Junia Norbana.*
42 *Sc. Largianum.*
45 *Lex Claudia.*
46 *Sc. Macedonianum.*
Sc. Velleianum.
52 *Sc. Claudianum.*
60 *Sc. Neronianum.*
61 *Lex Petronia.*
62 *Sc. Trebellianum.*
73 *Sc. Pegasianum.*
Beneficium divisionis (Rescript of Hadrian).

158 *Sc. Tertullianum.*
Addictio bonorum libertatis causa (Rescript of Marcus Aurelius).
178 *Sc. Orphitianum.*

291 Women allowed to adopt.
339 Formal words no longer necessary for appointment of heirs.

470 Formal words no longer necessary in stipulations.
Lex Zenoniana (*emphyteusis*).

JUSTINIAN:—
Change in law of adoption.
Changes in laws of succession.
Beneficium inventarii.
Abolition of *Latini Juniani* and *dedititii.*
Beneficium ordinis.
Changes in law of *peculium.*
Donatio propter nuptias.
Repeal of *lex Ælia Sentia, lex Furia Caninia*, and *sc. Claudianum.*

B.C.
30 THE EMPIRE.
The *jus respondendi* conferred by Augustus (*ut ex auctoritate ejus responderent*).
Trebatius.
Antistius Labeo.
Ateius Capito.

Proculus.
Masurius Sabinus.

A.D.
117 *Edictum perpetuum.*
Hadrian's rescript: *quibus permissum est jura condere* (GAI. i. 7).
Celsus.
Salvius Julianus.

Gaius.
Pomponius.

Papinian.
Paul.
Ulpian.
Modestinus.
212 Roman citizenship conferred upon the whole empire.
296 *Extraordinaria judicia* become the regular mode of trial.
306 *Codex Gregorianus.*
330 Seat of empire transferred to Constantinople.
365 *Codex Hermogenianus.*
426 *Lex citationis.*
438 *Codex Theodosianus.*
476 Fall of Western Empire.

JUSTINIAN (482-565):—
529 *Codex vetus* (not extant).
Quinquaginta decisiones.
533 The Digest.
The Institutes.
534 *Codex repetitæ prælectionis.*
535 564 The Novels.

INSTITUTIONUM JUSTINIANI

PROŒMIUM.

IN NOMINE DOMINI NOSTRI JESU CHRISTI.

IMPERATOR CÆSAR FLAVIUS JUSTINIANUS ALAMANNICUS GOTHICUS FRANCICUS GERMANICUS ANTICUS ALANICUS VANDALICUS AFRICANUS PIUS FELIX INCLYTUS VICTOR AC TRIUMPHATOR SEMPER AUGUSTUS CUPIDÆ LEGUM JUVENTUTI.

IN THE NAME OF OUR LORD JESUS CHRIST.

THE EMPEROR CÆSAR FLAVIUS JUSTINIANUS, VANQUISHER OF THE ALAMANI, GOTHS, FRANCS, GERMANS, ANTES, ALANI, VANDALS, AFRICANS, PIOUS, HAPPY, GLORIOUS, TRIUMPHANT CONQUEROR, EVER AUGUST, TO THE YOUTH DESIROUS OF STUDYING THE LAW, GREETING.

Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte possit gubernari et princeps Romanus victor existat non solum in hostilibus prœliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam juris religiosissimus quam victis hostibus triumphator.

1. Quorum utramque viam cum summis vigiliis et summa providentia adnuente Deo perfecimus. Et bellicos quidem sudores nostros barbaricæ gentes sub juga nostra deductæ cognoscunt et tam Africa quam aliæ innumerosæ provinciæ post tanta temporum spatia nostris victoriis a cælesti numine præstitis iterum dicioni Romanæ nostroque additæ imperio protestantur. Omnes vero populi legibus jam a nobis promulgatis vel compositis reguntur.

2. Et cum sacratissimas constitutiones antea confusas in luculentam ereximus consonantiam, tunc nostram extendimus curam et ad im-

The imperial majesty should be not only made glorious by arms, but also strengthened by laws, that, alike in time of peace and in time of war, the state may be well governed, and that the emperor may not only be victorious in the field of battle, but also may by every legal means repel the iniquities of men who abuse the laws, and may at once religiously uphold justice and triumph over his conquered enemies.

1. By our incessant labours and great care, with the blessing of God, we have attained this double end. The barbarian nations reduced under our yoke know our efforts in war; to which also Africa and very many other provinces bear witness, which, after so long an interval, have been restored to the dominion of Rome and our empire, by our victories gained through the favour of heaven. All nations moreover are governed by laws which we have already either promulgated or compiled.

2. When we had arranged and brought into perfect harmony the hitherto confused mass of imperial constitutions, we then extended our

mensa prudentiæ veteris volumina et opus desperatum, quasi per medium profundum euntes, cælesti favore jam adimplevimus.

care to the vast volumes of ancient law; and, sailing as it were across the mid-ocean, have now completed, through the favour of heaven, a work that once seemed beyond hope.

3. Cumque hoc Deo propitio peractum est, Triboniano, viro magnifico, magistro et ex quæstore sacri palatii nostri, nec non Theophilo et Dorotheo, viris illustribus, antecessoribus, quorum omnium sollertiam et legum scientiam et circa nostras jussiones fidem jam ex multis rerum argumentis accepimus, convocatis, specialiter mandavimus, ut nostra auctoritate nostrisque suasionibus componant institutiones: ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere, et tam aures quam animæ vestræ nihil inutile nihilque perperam positum, sed quod in ipsis rerum optinet argumentis, accipiant et quod in priore tempore vix post triennium inferioribus contingebat, ut tunc constitutiones imperatorias legerent, hoc vos a primordio ingrediamini, digni tanto honore tantaque reperti felicitate, ut et initium vobis et finis legum eruditionis a voce principali procedat.

3. When by the blessing of God this task was accomplished, we summoned the most eminent Tribonian, master and ex-quæstor of our palace, together with the illustrious Theophilus and Dorotheus, professors of law, all of whom have on many occasions proved to us their ability, legal knowledge, and obedience to our orders; and we have specially charged them to compose, under our authority and advice, Institutes, so that you may no more learn the first elements of law from old and erroneous sources, but apprehend them by the clear light of imperial wisdom; and that your minds and ears may receive nothing that is useless or misplaced, but only what obtains in actual practice. So that, whereas, formerly, the junior students could scarcely, after three years' study, read the imperial constitutions, you may now commence your studies by reading them, you who have been thought worthy of an honour and a happiness so great as that the first and last lessons in the knowledge of the law should issue for you from the mouth of the emperor.

4. Igitur post libros quinquaginta digestorum seu pandectarum, in quos omne jus antiquum collatum est (quos per eundem virum excelsum Tribonianum nec non ceteros viros illustres et facundissimos confecimus), in hos quattuor libros easdem institutiones partiri jussimus, ut sint totius legitimæ scientiæ prima elementa.

4. When, therefore, by the assistance of the same eminent person Tribonian and that of other illustrious and learned men, we had compiled the fifty books, called Digests or Pandects, in which is collected the whole ancient law, we directed that these Institutes should be divided into four books, which might serve as the first elements of the whole science of law.

5. Quibus breviter expositum est et quod antea optinebat, et quod postea desuetudine inumbratum ab imperiali remedio illuminatum est.

5. In these books a brief exposition is given of the ancient laws, and of those also which, overshadowed by disuse, have been again brought to light by our imperial authority.

6. Quas ex omnibus antiquorum institutionibus et præcipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum, aliisque multis commentariis compositas cum tres prædicti viri prudentes nobis optulerunt, et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accommodavimus.

6. These four books of Institutes thus compiled, from all the Institutes left us by the ancients, and chiefly from the commentaries of our Gaius, both in his Institutes, and in his work on daily affairs, and also from many other commentaries, were presented to us by the three learned men we have above named. We have read and examined them and have accorded to them all the force of our constitutions.

7. Summa itaque ope et alacri studio has leges nostras accipite et vosmet ipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rem publicam in partibus ejus vobis credendis gubernare.

Data undecimo kalendas Decembres Constantinopoli domino nostro Justiniano perpetuo Augusto tertium consule.

7. Receive, therefore, with eagerness, and study with cheerful diligence, these our laws, and show yourselves persons of such learning that you may conceive the flattering hope of yourselves being able, when your course of legal study is completed, to govern our empire in the different portions that may be entrusted to your care.

Given at Constantinople on the eleventh day of the calends of December, in the third consulate of the Emperor Justinian, ever August (533).

LIBER PRIMUS.

TIT. I. DE JUSTITIA ET JURE.

JUSTITIA est constans et perpetua voluntas jus suum cuique tribuens.	Justice is the constant and perpetual wish to render every one his due.

D. i. 1. 10.

The term *jus*, in its most extended sense, was taken by the Roman jurists to include all the commands laid upon men that they are bound to fulfil, both the commands of morality and of law. The distinction between commands which are only enforced by the sanction of public or private opinion, and those enforced by positive legal sanctions, may seem clear to us; but the Roman jurists, in speaking of the elementary principles and divisions of jurisprudence, did not keep law and morality distinct. Celsus defines *jus* as *ars boni et æqui.* (D. i. 1. 1.) This extension of the term would sink positive law in morality; that only would be supposed to be commanded which ought to be commanded. The confusion arose principally from the view of the law of nature, borrowed from Greek philosophy by the jurists. (See Introd. sec. 14.)

Jus, used in its strictly legal sense, has two principal meanings. It either signifies *law*, that is, the whole mass of rights and duties protected and enforced by legal remedies, or it means any single right, that is, any faculty or privilege accorded by law to one man accompanied by a correlative duty imposed on another man. *Jus itineris*, for instance, is the right given to one man of going through the land of another who is placed under a duty to let him pass. Neither a right nor a duty, at any rate in the sphere of private law with which alone the Institutes deal, can exist without the other. (See Introd. sec. 36.)

1. Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.	1. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.

D. i. 1. 10. 2.

Jurisprudentia is the knowledge of what is *jus*, and *jus*, according to the theory of the law of nature, laid down what is commanded by right reason, this right reason being common to the divine scheme of things and to man. On this ground, and also because public law has to deal with religious worship, the knowledge of divine things was necessary, as well as the knowledge of human things, to say what were the contents of *jus*. Both this and the preceding definition are taken at random out of the writings of Ulpian. (See Introd. sec. 24.)

2. His generaliter cognitis et incipientibus nobis exponere jura populi Romani ita maxime videntur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. Alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore ejus, sæpe etiam cum diffidentia, quæ plerumque juvenes avertit, serius ad id perducemus, ad quod leniore via ductus sine magno labore et sine ulla diffidentia maturius perduci potuisset.

2. Having explained these general terms, we think we shall commence our exposition of the law of the Roman people most advantageously, if our explanation is at first plain and easy, and is then carried on into details with the utmost care and exactness. For, if at the outset we overload the mind of the student, while yet new to the subject and unable to bear much, with a multitude and variety of topics, one of two things will happen—we shall either cause him wholly to abandon his studies, or, after great toil, and often after great distrust of himself (the most frequent stumbling-block in the way of youth), we shall at last conduct him to the point, to which, if he had been led by a smoother road, he might, without great labour, and without any distrust of his own powers, have been sooner conducted.

3. Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.

3. The maxims of law are these: to live honestly, to hurt no one, to give every one his due.

4. Hujus studii duæ sunt positiones, publicum et privatum. Publicum jus est, quod ad statum rei Romanæ spectat, privatum, quod ad singulorum utilitatem pertinet. Dicendum est igitur de jure privato, quod tripertitum est; collectum est enim ex naturalibus præceptis aut gentium aut civilibus.

4. The study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman Empire; private law, that which concerns the interests of individuals. We are now to treat of the latter, which is composed of three elements, and consists of precepts belonging to natural law, to the law of nations, and to the civil law.

D. i. 1. 1. 2.

Both the *jus publicum* and the *jus privatum* fall under municipal law, that is, the law of a particular state. *Publicum jus in sacris, in sacerdotibus, in magistratibus consistit.* (D. i. 1. 1. 2.) Public law regulates religious worship and civil administration; private law determines the rights and duties of individuals. The threefold division of private law given in the text is discussed in the next section

TIT. II. DE JURE NATURALI, GENTIUM ET CIVILI.

Jus naturale est, quod natura omnia animalia docuit. Nam jus istud non humani generis proprium est, sed omnium animalium, quæ in cælo, quæ in terra, quæ in mari nascuntur. Hinc descendit maris atque feminæ conjugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio: videmus etenim cetera quoque animalia istius juris peritia censeri.

The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the air, the earth, or the sea. Hence comes that yoking together of male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other animals besides man are considered as having knowledge of this law.

D. i. 1. 1. 3.

In the Introduction (sec. 14) a sketch has been given of what the jurists meant by the *lex naturæ*. It was the expression of right reason inherent in nature and man, and having a binding force as a law. It was contrasted with the *jus civile*, the old strict law of Rome (Introd. sec. 10), and also with the *jus gentium*, the sum, that is, of the law found to obtain in other nations besides the Romans, as well as in Roman law. (Introd. sec. 12.) There thus arose the threefold division of law adopted in the last paragraph of the last title; but the *jus gentium* and the *jus naturale* were often placed in the same head of division, for the law common to all nations was but the embodiment and indication of what right reason was supposed to command to all men. Thus while the threefold division of law was adopted by some jurists, a twofold division was adopted by others, and is adopted in the next and the eleventh paragraphs of this title, Justinian first borrowing from Ulpian, who adopted the threefold division, and then from Gaius, who adopted the twofold.

Unfortunately, in order to give a notion of *jus naturale*, Justinian has borrowed a passage from Ulpian, in which that jurist runs off into a subsidiary and divergent line of thought. It is easy to see that if we begin to make inherent reason the foundation of law, we may find it necessary to take into account the community of actions which, in some of the primary features of physical life, reason or instinct suggests to man and animals. If *jus* is that which nature commands, nature may be said to command the propagation of the species in animals as much as in man, and thus there would be a *jus* common to animals and to men. A jurist to whom the theory of the *lex naturæ* was familiar, might easily pursue the subject to a point in which men and animals seemed to meet. But the main theory had nothing to do with animals, as it looked only to the reason inherent in the universe and in man, and in considering what the Roman jurists meant by *jus naturale* this fragment of Ulpian may be dismissed almost entirely from our notice.

1. Jus autem civile vel gentium ita dividitur: omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur: nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est vocaturque jus civile, quasi jus proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur vocaturque jus gentium, quasi quo jure omnes gentes utuntur. Et populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur. Quæ singula qualia sunt, suis locis proponemus.

1. Civil law is thus distinguished from the law of nations. Every community governed by laws and customs uses partly its own law, partly laws common to all mankind. The law which a people makes for its own government belongs exclusively to that state, and is called the civil law, as being the law of the particular state. But the law which natural reason appoints for all mankind obtains equally among all nations, and is called the law of nations, because all nations make use of it. The people of Rome, then, are governed partly by their own laws, and partly by the laws which are common to all mankind. What is the nature of these two component parts of our law we will set forth in the proper place.

Gai. i. 1.

2. Sed jus quidem civile ex unaquaque civitate appellatur, veluti Atheniensium: nam si quis velit Solonis vel Draconis leges appellare jus civile Atheniensium, non erraverit. Sic enim et jus, quo populus Romanus utitur, jus civile Romanorum appellamus vel jus Quiritium, quo Quirites utuntur; Romani enim a Quirino Quirites appellantur. Sed quotiens non addimus, cujus sit civitatis, nostrum jus significamus: sicuti cum poetam dicimus nec addimus nomen, subauditur apud Græcos egregius Homerus, apud nos Vergilius. Jus autem gentium omni humano generi commune est. Nam usu exigente et humanis necessitatibus gentes humanæ quædam sibi constituerunt: bella etenim orta sunt et captivitates secutæ et servitutes, quæ sunt juri naturali contrariæ (jure enim naturali ab initio omnes homines liberi nascebantur); ex hoc jure gentium et omnes pæne contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum et alii innumerabiles.

2. Civil law takes its name from the state which it governs, as, for instance, from Athens; for it would be very proper to speak of the laws of Solon or Draco as the civil law of Athens. And thus the law which the Roman people make use of is called the civil law of the Romans, or that of the Quirites, as being used by the Quirites; for the Romans are called Quirites from Quirinus. But whenever we speak of civil law, without adding of what state we are speaking, we mean our own law: just as when 'the poet' is spoken of without any name being expressed, the Greeks mean the great Homer, and we Romans mean Virgil. The law of nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free. Further, from this law of nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others.

D. i. 4. 5.

The term *jus civile*, as used here, entirely depends for its meaning on the contrast between it and the *jus gentium*. When the jurists came to examine different systems of laws, they found much in each that was common to all. This common part they termed the *jus gentium;* and the residue, the part peculiar to each state, they called *jus civile*. The contracts of sale, hiring, and the others mentioned in the text, were, they found, carried

on much in the same way in every country, and they therefore assigned them to the head of *jus gentium*, and contrasted them with forms of contract which were peculiar to the old Roman law, and were therefore considered part of the *jus civile*. In the usual sense of *jus civile*, in which it means the old law of Rome prior to the *jus honorarium* (see Introd. sec. 10), these contracts were part of the *jus civile*, that is, they were part of, and were recognised by, the old law, but they were also part of the general law of nations, and no forms peculiar to Roman law were necessary for their creation.

3. Constat autem jus nostrum aut ex scripto aut ex non scripto, ut apud Græcos: τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι. Scriptum jus est lex, plebiscita, senatusconsulta, principum placita, magistratuum edicta, responsa prudentium.

3. Our law is written and unwritten, just as among the Greeks some of their laws were written and others not written. The written part consists of laws, *plebiscita*, *senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurisprudents.

4. Lex est, quod populus Romanus senatorio magistratu interrogante, veluti consule, constituebat. Plebiscitum est, quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat. Plebs autem a populo eo differt, quo species a genere: nam appellatione populi universi cives significantur, connumeratis etiam patriciis et senatoribus: plebis autem appellatione sine patriciis et senatoribus ceteri cives significantur. Sed et plebiscita, lege Hortensia lata, non minus valere quam leges cœperunt.

4. A law is that which was enacted by the Roman people on its being proposed by a senatorian magistrate, as a consul. A *plebiscitum* is that which was enacted by the plebs on its being proposed by a plebeian magistrate, as a tribune. The *plebs* differs from the people as a species from its genus; for all the citizens, including patricians and senators, are comprehended in the people; but the *plebs* only includes citizens, not being patricians or senators. But *plebiscita*, after the Hortensian law had been passed, began to have the same force as laws.

GAI. i. 3.

A *lex* or *populi scitum*, to use a word made by the commentators on the analogy of *plebiscitum*, was passed originally only in the *comitia curiata;* after the establishment of the *comitia centuriata* in both these *comitia;* but, excepting in the case of conferring the *imperium*, almost always in the *centuriata*. (See Introd. sec. 5, 15.)

The *lex Hortensia*, B.C. 287, had been preceded by the *lex Valeria Horatia*, B.C. 449, and the *lex Publilia*, B.C. 339, by both of which it was provided that *plebiscita* should bind the whole people. Either the effect of their provisions had been disputed, or exceptions had been made to them, or perhaps the extension of the authority of the *plebiscitum* which they gave was not so complete as their terms would seem to imply. (Nieb. ii. 366.) The term *lex* is very frequently applied to *plebiscita* as well as to *populi scita*. (See Introd. sec. 9.)

5. Senatusconsultum est, quod senatus jubet atque constituit. Nam cum auctus est populus Romanus in eum modum, ut difficile sit in

5. A *senatus-consultum* is that which the senate commands and appoints: for, when the Roman people was so increased that it was difficult to

unum eum convocari legis sanciendæ causa, æquum visum est senatum vice populi consuli.

assemble it together to pass laws, it seemed right that the senate should be consulted in the place of the people.

GAI. i. 4; D. i. 2. 2. 9.

Senatus-consulta had in some instances the force of a law even in the times of the republic, for we have a few preserved of a date antecedent to the Cæsars, which undoubtedly had the force of law; but they all relate to matters of social administration, such as forbidding burial within the city, or the importation of wild beasts. (See Introd. sec. 15.) But we cannot speak of *senatus-consulta* as a substantial part of the general legislation till the times of the emperors, when they superseded every other except the emperor's enactments. The appeal of the emperor to their authority dwindled down into a mere form. (Cod. i. 14. 12. 1, *in præsenti leges condere soli imperatori concessum est.*)

6. Sed et quod principi placuit, legis habet vigorem, cum lege regia, quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem concessit. Quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel edicto præcepit, legem esse constat: hæ sunt, quæ constitutiones appellantur. Plane ex his quædam sunt personales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult: nam quod alicui ob merita indulsit, vel si cui pœnam irrogavit, vel si cui sine exemplo subvenit, personam non egreditur. Aliæ autem, cum generales sunt, omnes procul dubio tenent.

6. That which seems good to the emperor has also the force of law; for the people, by the *lex regia*, which is passed to confer on him his power, make over to him their whole power and authority. Therefore whatever the emperor ordains by rescript, or decides in adjudging a cause, or lays down by edict, is unquestionably law; and it is these enactments of the emperor that are called constitutions. Of these, some are personal, and are not to be drawn into precedent, such not being the intention of the emperor. Supposing the emperor has granted a favour to any man on account of his merits, or inflicted some punishment, or granted some extraordinary relief, the application of these acts does not extend beyond the particular individual. But the other constitutions, being general, are undoubtedly binding on all.

GAI. i. 5; D. i. 4. 1.

The imperial constitutions, though known in the time of the previous emperors, first attained, under Hadrian, the position of being in reality the only source of law. They were of three kinds: first, *epistolæ*, letters or answers to letters addressed by the emperor to different individuals or public bodies, or *mandata*, orders given to particular officers, and *rescripta*, answers given by the emperor to magistrates who requested his assistance in the decision of doubtful points (Bk. i. Tit. 8. 2); secondly, judicial sentences, *decreta*, given by the emperors (Bk. ii. Tit. 15. 4); both these kinds having force only by serving as a precedent in similar cases; and thirdly, *edicta*, or laws binding generally on all the subjects of the emperor. (See Introd. sec. 16.)

It is here said, on the authority of Ulpian (D. i. 4. 1), that the emperor derives his authority from the *lex regia*. This refers to the law of the *comitia curiata* by which the *imperium* was conferred. Gaius says, 1. 5, *nec unquam dubitatum est quin principis constitutio legis vicem optineat, cum ipse imperator per legem imperium accipiat.* This law was a relic of that by which the king had been invested with the royal authority, intrusted to him by the *curia* representing the *populus;* and it was considered that the emperor was in like manner invested with all the power of the Roman people transferred to him on his receiving the *imperium.* (See Introd. sec. 16.)

7. Prætorum quoque edicta non modicam juris optinent auctoritatem. Hæc etiam jus honorarium solemus appellare, quod qui honorem gerunt, id est magistratus, auctoritatem huic juri dederunt. Proponebant et ædiles curules edictum de quibusdam casibus, quod edictum juris honorarii portio est.

7. The edicts of the prætors are also of great authority. These edicts are called the *jus honorarium*, because those who bear honours in the state, that is, the magistrates, have given it their sanction. The curule ædiles also used to publish an edict relative to certain subjects, which edict also became part of the *jus honorarium.*

GAI. i. 6; D. xxi. 1. 1.

Papinian says (D. i. 1. 7), that the *jus prætorum* was introduced by the prætors, *adjuvandi vel supplendi vel corrigendi juris civilis gratia.* New circumstances, new habits of thinking, and, in the case of the *prætor peregrinus*, a new scope for authority, compelled the prætor to use an equitable power, and frequently equitable fictions, to extend the narrow limits of the old civil law. (See Introd. sec. 12.) The decisions by which he did this were called *edicta.* At the beginning of his year of office, the prætor published a list of the rules by which he intended to be bound, and this was called the *edictum perpetuum*, as it ran on from year to year under successive prætors, each making such additions and changes as he thought necessary. *Edictum repentinum* was one made to meet a particular case. The *lex Cornelia* (B.C. 67) forbad a prætor to depart during his term of office from the edict he had promulgated at its commencement. In the time of Hadrian, a jurist named Salvius Julianus, who filled the office of prætor, systematised and condensed the edicts of preceding prætors into a final *edictum perpetuum*, which, if further annual edicts were issued at all, which is doubtful, served as their basis, and is specially known as the *edictum perpetuum.* (See Introd. sec. 19.)

8. Responsa prudentium sunt sententiæ et opiniones eorum, quibus permissum erat jura condere. Nam antiquitus institutum erat, ut essent qui jura publice interpretarentur, quibus a Cæsare jus respondendi datum est, qui jurisconsulti appellabantur. Quorum omnium

8. The answers of the jurisprudents are the decisions and opinions of persons who were authorised to determine the law. For anciently it was provided that there should be persons to interpret publicly the law, who were permitted by the emperor to give answers on questions of law. They

sententiæ et opiniones eam auctoritatem tenebant, ut judici recedere a responso eorum non liceret, ut est constitutum.

were called jurisconsults; and the authority of their decisions and opinions, when they were all unanimous, was such, that the judge could not, according to the constitutions, refuse to be guided by their answers.

GAI. i. 7.

It is to the change in the position of the jurists effected by Augustus (Introd. sec. 20) that reference is made in the words *quibus a Cæsare jus respondendi datum est,* and it is to the constitutions of Hadrian (sec. 20) and Theodosius (sec. 27) that the words *judici recedere a responso eorum non liceret ut est constitutum,* refer.

9. Ex non scripto jus venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.

9. The unwritten law is that which usage has established; for ancient customs, being sanctioned by the consent of those who adopt them, are like laws.

D. i. 3. 32.

Quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? (D. i. 3. 32.) The Roman jurists did not trouble themselves to ascertain very accurately whence laws derive their binding force. The vague expression in the text *mores legem imitantur,* and the question asked in these words of the Digest, leave undecided the question of the relation of customs to laws. The Roman law held that customs could not only interpret law (*optima legum interpres consuetudo,* D. i. 3. 37), but also abrogate it. In the eleventh section of this Title it is said that the enactment of a state may be changed *tacito consensu populi,* and in the Digest (i. 3. 32. 1) it is expressly stated that *leges tacito consensu omnium per desuetudinem abrogantur.* The Code, certainly, lays down (viii. 53) that the authority of a custom is not so great that it can 'conquer reason or law'; but this is said of particular not general customs. A law fallen into desuetude might be abrogated by general custom, but a particular custom, of only local force, would not be suffered to prevail against the general law.

10. Et non ineleganter in duas species jus civile distributum videtur. Nam origo ejus ab institutis duarum civitatium, Athenarum scilicet et Lacedæmonis, fluxisse videtur: in his enim civitatibus ita agi solitum erat, ut Lacedæmonii quidem magis ea, quæ pro legibus observarent, memoriæ mandarent, Athenienses vero ea, quæ in legibus scripta reprehendissent, custodirent.

10. The civil law is not improperly divided into two kinds, for the division seems to have had its origin in the customs of the two states Athens and Lacedæmon. For in these states it used to be the case, that the Lacedæmonians rather committed to memory what they were to observe as law, while the Athenians rather kept safely what they had found written in their laws.

It is hardly necessary to say, that the distinction between written and unwritten law must always exist where laws are written at all and where no attempt has been made to express all

law in positive terms; and that this Greek origin for the two branches of Roman law is quite imaginary.

11. Sed naturalia quidem jura, quæ apud omnes gentes peræque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent: ea vero, quæ ipsa sibi quæque civitas constituit, sæpe mutari solent vel tacito consensu populi vel alia postea lege lata.

11. The laws of nature, which all nations observe alike, being established by a divine providence, remain ever fixed and immutable. But the laws which every state has enacted, undergo frequent changes, either by the tacit consent of the people, or by a new law being subsequently passed.

D. i. 3. 32. 1.

Justinian, abandoning the threefold division of Ulpian, which he had adopted in the earlier paragraphs of this chapter, now follows the twofold division of Gaius (i. 1), into *jus naturale* and *jus civile*.

12. Omne autem jus, quo utimur, vel ad personas pertinet vel ad res vel ad actiones. Ac prius de personis videamus. Nam parum est jus nosse, si personæ, quarum causa statutum est, ignorentur.

12. All our law relates either to persons, or to things, or to actions. Let us first speak of persons; as it is of little purpose to know the law, if we do not know the persons for whom the law was made.

GAI. i. 8.

In Gaius, and in the Institutes of Justinian, obligations are treated of under the head of things. The division of law which compels them to be so treated is obviously inaccurate, for actions themselves are just as much things as obligations; and if obligations were classed under the head of things because they are a mode of obtaining things, there is the objection to the classification, that the obtaining of a thing is only an ultimate and accidental result, not a necessary part, of an obligation.

TIT. III. DE JURE PERSONARUM.

Summa itaque divisio de jure personarum hæc est, quod omnes homines aut liberi sunt aut servi.

The chief division in the rights of persons is this: men are all either free or slaves.

GAI. i. 9.

Every being capable of having, and being subject to, rights was called in Roman law a *persona*. (See Introd. sec. 37.) Thus not only was the individual, when looked at as having this capacity, a *persona*, but so also were corporations and public bodies. Slaves were *personæ* in the sense that they were not merely things, and they could go through some legal forms, and were entitled in later times to a certain amount of legal protection; but, although they are thus treated of under the law of persons, it is chiefly their want of legal capacities that attracts attention. The word *persona* has also another sense. It was used not only for the being who had the capacity of enjoying rights and fulfilling duties, but also for the different characters or parts in which this capacity showed itself; or, to borrow the metaphor suggested by the etymology of the word, for the different masks or faces which the

actor wore in playing his part in the drama of civic and social life. Thus, for instance, the same man might have the *persona patris*, or *tutoris*, or *mariti*; that is, might be regarded in his character of father, tutor, or husband.

Status is the position which a *persona* occupies in the eye of the law. (D. i. 5.) In the possible position of a *persona* the Roman law recognised three main heads (*capita*), viz.: *libertas*, the capacity to have and be subject to the rights and obligations of a freeman; *civitas*, the capacity to have and be subject to the rights and obligations of a Roman citizen; and *familia*, the capacity to have and be subject to the rights and obligations of a person belonging to a Roman family. These three 'heads' were again, by an expression borrowed from that applied to citizens when appearing as 'heads' in the censor's list, summed up in the singular '*caput*'; the 'head' of a *persona* thus meaning the sum of the person's legal capacities. The *status* of a free Roman citizen was that of having this *caput*. The *status* of a slave was that of having no *caput*. Since freeborn members of a Roman family acquired, as such members, the position of *cives*, modern jurists sometimes use *status* in the sense of family position. (See Introd. sec. 38, 39, 40.)

The extent and meaning of each of the capacities summed up in *caput* may be illustrated by contrasting it with its corresponding negative, that is, with the absence of the capacity spoken of. In order to determine the capacity of freemen, we may speak of the position of (freedmen and) slaves; in order to determine the capacity of a citizen, we may speak of the position of a *Latinus* and a *peregrinus*; in order to determine the capacity of persons having the amplest family position, i.e. being *sui juris*, we may speak of persons having a less ample position, and being either under the power of others (*alieni juris*) or under the authority or guidance of others, i.e. under tutors or curators. This is the method adopted in the Institutes, and the discussion of the points thus suggested occupies the remainder of the first book.

1. Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas ejus, quod cuique facere libet, nisi si quid aut vi aut jure prohibetur.

2. Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subicitur.

1. Freedom, from which is derived the term free as applied to men, is the natural power of doing each what we please, unless prevented either by force or by law.

2. Slavery is an institution of the law of nations, by which one man is made the property of another, contrary to natural right.

D. i. 5. 4. 1.

The institution of slavery was the one thing in which the *jus gentium* seemed to be irreconcilable with the *jus naturale*; and it was this, probably, more than anything else, that made some of the jurists adopt the threefold division of law.

3. Servi autem ex eo appellati sunt, quod imperatores captivos ven-

3. Slaves are denominated *servi*, because generals order their captives

dere jubent ac per hoc servare nec occidere solent: qui etiam mancipia dicti sunt, quod ab hostibus manu capiuntur.

to be sold, and thus preserve them, and do not put them to death. Slaves are also called *mancipia*, because they are taken from the enemy by the strong hand.

4. Servi autem aut nascuntur aut fiunt. Nascuntur ex ancillis nostris: fiunt aut jure gentium, id est ex captivitate, aut jure civili, veluti cum homo liber major viginti annis ad pretium participandum sese venumdari passus est.

4. Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him.

D. i. 5. 5. 1.

Children born out of the pale of lawful marriage always followed the condition of the mother; and as slaves were incapable of contracting a lawful marriage, in the peculiar sense of 'lawful' adopted by Roman law, the children of a female slave were necessarily slaves. They were called *vernæ* when born and reared on the property of the owner of their mother. (See Introd. sec. 46.)

In order to prevent a fraud, by which a person, having allowed himself to be sold in order to share the price with the vendor, turned round on the purchaser and claimed his liberty as being freeborn, a law, perhaps the *senatusconsultum Claudianum*, A.D. 52 (D. xl. 3. 5), enacted that the perpetrator of the fraud should be bound by his statement, and be held to be a slave. In the early law of Rome, it may be observed, a citizen could really sell himself so as to lose his freedom; but he always retained a right of redemption.

There were other modes by which slavery could arise under the Roman law, as (1) when a free woman had commerce with a slave, or (2) when malefactors were condemned to the amphitheatre or the mines, the guilty parties were held in law to be slaves. These latter modes of legal slavery were abolished by Justinian. (Bk. iii. Tit. 12. 1. Nov. 22. cap. 8.) Lastly (3) an emancipated slave, if guilty of any gross act of ill behaviour towards his patron, i.e. his late owner, such as a violent attack on his reputation or person, might be reclaimed to slavery. (D. xxv. 3. 6.)

In the older law, *addictio*, that is, delivery of the person to a creditor by way of execution for a debt, the being detected in *furtum manifestum*, and the omitting to be inscribed in the tables of the census in order to defraud the revenue, were each a cause of slavery; but these causes had become obsolete long before the time of Justinian.

5. In servorum condicione nulla differentia est. In liberis multæ differentiæ sunt: aut enim ingenui sunt aut libertini.

5. In the condition of slaves there is no distinction; but there are many distinctions among free persons; for they are either born free, or have been set free.

D. i. 5. 5. 5.

In the later empire there was introduced an important novelty in the condition of slaves by the institution of *coloni*, that is, serfs attached to the soil, *ascripti glebæ*, passing with it, and bound to remain on it, but having much of the position of freemen. They were of two kinds: if *coloni inquilini* or *liberi*, they were entitled to retain for their own use all they could gain from the soil beyond the value of a yearly payment, which they had to make to the owner of the soil; if *coloni adscriptitii* or *censiti*, they had no rights of property as against their masters. (C. xi. 47 *et seq.*)

TIT. IV. DE INGENUIS.

Ingenuus is est, qui statim, ut natus est, liber est, sive ex duobus ingenuis matrimonio editus, sive ex libertinis, sive ex altero libertino, altero ingenuo. Sed et si quis ex matre libera nascatur, patre servo, ingenuus nihilo minus nascitur: quemadmodum qui ex matre libera et incerto patre natus est, quoniam vulgo conceptus est. Sufficit autem liberam fuisse matrem eo tempore, quo nascitur, licet ancilla conceperit. Et ex contrario si libera conceperit, deinde ancilla facta pariat, placuit eum, qui nascitur, liberum nasci, quia non debet calamitas matris ei nocere, qui in utero est. Ex his et illud quæsitum est, si ancilla prægnans manumissa sit, deinde ancilla postea facta peperit, liberum an servum pariat? Et Marcellus probat, liberum nasci: sufficit enim ei, qui in ventre est, liberam matrem vel medio tempore habuisse: quod et verum est.

A person is *ingenuus* who is free from the moment of his birth, by being born in matrimony, of parents who have been either both born free, or both made free, or one of whom has been born and the other made free; and when the mother is free, and the father a slave, the child nevertheless is born free; just as he is if his mother is free, and it is uncertain who is his father; for he has been conceived promiscuously. And it is sufficient if the mother is free at the time of the birth, although a slave when she conceived; and on the other hand, if she be free when she conceives, and is a slave when she gives birth to her child, yet the child is held to be born free; for the misfortune of the mother ought not to prejudice her unborn infant. The question hence arose, if a female slave with child is made free, but again becomes a slave before the child is born, whether the child is born free or a slave. Marcellus thinks it is born free, for it is sufficient for the unborn child, if the mother has been free, although only in the intermediate time; and this also is true.

GAI. i. 11, 82, 89, 90; D. i. 5. 5.

If a child was born *in matrimonio*, a tie which could only, in the eyes of the civil law, be contracted between two free persons, the child was free from the moment of conception. If it was not born *in matrimonio*, then it followed the condition of the mother; and it was her condition at the time of birth, not at that of conception, which decided the *status* of the child. It was only by a departure from the strict theory of law that the enjoyment of liberty by the mother before the birth was allowed to make the child free. (GAI. i. 89.)

1. Cum autem ingenuus aliquis natus sit, non officit illi in servitute fuisse et postea manumissum esse:

1. When a man has been born free, he does not cease to be *ingenuus* because he has been in the position of

sæpissime enim constitutum est, natalibus non officere manumissionem.

a slave, and has subsequently been enfranchised; for it has been often settled that enfranchisement does not prejudice the rights of birth.

In servitute fuisse. This does not mean to have been a slave, but to have been in the position of one. As if a freeborn child was considered erroneously to be a slave, and was manumitted, and then his free birth was discovered, his *status* would be that of an *ingenuus*, and not of a *libertinus*.

TIT. V. DE LIBERTINIS.

Libertini sunt, qui ex justa servitute manumissi sunt. Manumissio autem est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, et manumissus liberatur potestate. Quæ res a jure gentium originem sumpsit, utpote cum jure naturali omnes liberi nascerentur, nec esset nota manumissio, cum servitus esset incognita: sed posteaquam jure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, jure gentium tria genera hominum esse cœperunt, liberi et his contrarium servi et tertium genus libertini, qui desierant esse servi.

Freedmen are those who have been manumitted from legal servitude. Manumission is the 'giving of liberty'. For while any one is in slavery, he is under 'the hand' and power of another, but by manumission he is freed from this power. This institution took its rise from the law of nations; for by the law of nature all men were born free; and manumission was not heard of, as slavery was unknown. But when slavery came in by the law of nations, the boon of manumission followed. And whereas we all were denominated by the one natural name of 'men,' the law of nations introduced a division into three kinds of men, namely, freemen, and in opposition to them, slaves; and thirdly, freedmen who had ceased to be slaves.

GAI. i. 11; D. i. 1. 4.

In some few cases a slave could obtain liberty without manumission. Many of these cases are enumerated in the Digest (xl. 8). A slave, for instance, who was abandoned by his master on account of disease or infirmity (*ob gravem infirmitatem*), was pronounced free by an edict of Claudius.

1. Multis autem modis manumissio procedit: aut enim ex sacris constitutionibus in sacrosanctis ecclesiis aut vindicta aut inter amicos aut per epistulam aut per testamentum aut aliam quamlibet ultimam voluntatem. Sed et aliis multis modis libertas servo competere potest, qui tam ex veteribus quam nostris constitutionibus introducti sunt.

1. Manumission is effected in various ways; either in the face of the Church, according to the imperial constitutions, or by *vindicta*, or in the presence of friends, or by letter, or by testament, or by any other expression of a man's last will. And a slave may also gain his freedom in many other ways, introduced by the constitutions of former emperors, and by our own.

GAI. i. 17; D. xl.; C. i. 13; vii. 6. 1. 1.

A *manumissio* was said to be *legitima* when made in one of the three ways recognised by the old law. These three modes of effecting a *legitima manumissio* were *census*, *vindicta* and *testa-*

mentum. A *legitima manumissio* was made: 1st, *censu*, i.e. by the master and the slave appearing before the censor at the time of the census being taken, and the slave's name being, at the master's desire, enrolled on the census list. This mode became obsolete in the time of the empire (ULP. *Reg*. i. 8; GAI. i. 140), the census having been rarely taken under the early emperors, and not at all after Decius, A.D. 249. 2nd, *vindicta*, i.e. by means of a fictitious suit called *causa liberalis* (D. xl. 12), in which a person, termed the *assertor libertatis*, that is, a friend of the slave, or in his place a lictor, asserted before the prætor that the slave was free, by touching him on the head with a wand (which represented the *hasta* or symbol of proprietorship), and thus claiming him as against the master. In token of his consent, the master turned him round and then let him go, and the magistrate pronounced him free. 3rd, *testamento* (D. xl. 4), i.e. by testament. Freedom might be given by testament, either as a legacy to the slave himself, in which case the slave was called *orcinus*, because his patron, i.e. the person to whom he owed his liberty, was dead when he gained it; or the heir might be charged to grant or procure the liberty of the slave, in which case the heir would be the patron. If a slave was made by testament conditionally free, he was said to be *statu liber*—*statu liber est, qui statutam et destinatam in tempus vel conditionem libertatem habet*. (D. xl. 7. 1.) The solemnities attached to manumission by the *vindicta* ceased to be strictly observed long before the time of Justinian. Although the magistrate was at his country seat (D. xl. 2. 8), no lictors present, or the master silent, the manumission was still held good.

By *manumissio legitima* the slave became a Roman citizen, and the state, therefore, was represented in the proceedings by the censor and by the prætor in the two first-mentioned modes of emancipation, and in the third case by the Roman testament having always, theoretically, a public character attached to it; and it was when the state was so represented that the manumission was *legitima*. But manumission was not always *legitima*. Usage and the prætor's authority established gradually many other less formal methods of accomplishing the same object, and the imperial constitutions added others. Of those mentioned in the text, that in presence of the Church was established long before the time of Constantine, as we gather from a constitution dated A.D. 316. (C. i. 13.) The ceremony was generally performed at some one of the great feasts, and it was necessary it should take place before the bishops. Freedom could also be given by a master writing to a slave (*per epistolam*), or declaring before his friends (*inter amicos*), that he gave the slave liberty, or by his making a codicil to that effect (*per quamlibet aliam ultimam voluntatem*), witnesses, however, being necessary in each of these cases. (C. vii. 6. 1; C. vii. 6. 2; C. vi. 36. 8. 3.) Other methods are noticed in the Code (vii. 6. 3-12), all based upon an implied wish of the master to free the slave. Until the time of Justinian,

however, the slave emancipated by any of these private modes was only thereby placed in the position of a *Latinus* or a *dediticius*, and not in that of a Roman citizen.

2. Servi vero a dominis semper manumitti solent, adeo ut vel in transitu manumittantur, veluti cum prætor aut proconsul aut præses in balneum vel in theatrum eat.

2. Slaves may be manumitted by their masters at any time; even when the magistrate is only passing along, as when a prætor, or proconsul, or *præses*, is going to the baths or the theatre.

3. Libertinorum autem status tripertitus antea fuerat: nam qui manumittebantur, modo majorem et justam libertatem consequebantur et fiebant cives Romani, modo minorem et Latini ex lege Junia Norbana fiebant, modo inferiorem et fiebant ex lege Ælia Sentia dediticiorum numero. Sed dediticiorum quidem pessima condicio jam ex multis temporibus in desuetudinem abiit, Latinorum vero nomen non frequentabatur: ideoque nostra pietas, omnia augere et in meliorem statum reducere desiderans, in duabus constitutionibus hoc emendavit et in pristinum statum reduxit, quia et a primis urbis Romæ cunabulis una atque simplex libertas competebat, id est eadem, quam habebat manumissor, nisi quod scilicet libertinus sit, qui manumittitur, licet manumissor ingenuus sit. Et dediticios quidem per constitutionem expulimus, quam promulgavimus inter nostras decisiones, per quas, suggerente nobis Triboniano, viro excelso, quæstore, antiqui juris altercationes placavimus: Latinos autem Junianos et omnem, quæ circa eos fuerat, observantiam alia constitutione per ejusdem quæstoris suggestionem correximus, quæ inter imperiales radiat sanctiones, et omnes libertos, nullo nec ætatis manumissi nec dominii manumissoris nec in manumissionis modo discrimine habito, sicuti antea observabatur, civitate Romana donavimus: multis additis modis, per quos possit libertas servis cum civitate Romana, quæ sola in præsenti est, præstari.

3. Freedmen were formerly divided into three classes. For those who were manumitted sometimes obtained a complete liberty, and became Roman citizens; sometimes a less complete, and became Latins under the *lex Junia Norbana;* and sometimes a liberty still inferior, and were ranked as *dediticii*, by the *lex Ælia Sentia*. But this lowest class, that of the *dediticii*, has long disappeared, and the title of Latins become rare; and so in our benevolence, which leads us to complete and improve everything, we have introduced a great reform by two constitutions, which re-established the ancient usage; for in the infancy of the state there was but one liberty, the same for the enfranchised slave as for the person who manumitted him; excepting, indeed, that the person manumitted was a freedman, while the manumittor was freeborn. We have abolished the class of *dediticii* by a constitution published among our decisions, by which, at the suggestion of the eminent Tribonian, quæstor, we have put an end to difficulties arising from the ancient law. We have also, at his suggestion, done away with the *Latini Juniani*, and everything relating to them, by another constitution, one of the most remarkable of our imperial ordinances. We have made all freedmen whatsoever Roman citizens, without any distinction as to the age of the slave, or the interest of the manumittor, or the mode of manumission. We have also introduced many new methods, by which liberty may be given to slaves, together with Roman citizenship, the only kind of liberty that now exists.

GAI. i. 12-17; C. vii. 5, 6.

For a complete emancipation it was originally necessary that the owner should have quiritary, i.e. complete, ownership (see Introd. sec. 62) of the slave, and that the *manumissio* should be *legitima*. If the ownership was less full, or the ceremony pri-

vate, the slave lived in a state of freedom, and the prætor forbad the master to exert his strictly legal power of reasserting his right to the services of the slave; but the condition of the slave as regarded the state was not that of a citizen, and at his death his master took all his property.

By the *lex Ælia Sentia*, A.D. 4, it was enacted that, to make the emancipation complete, that is, to make the slave a citizen, a third requisite should be added. He was to be thirty years old (GAI. i. 18); or else, if he was under that age, the ceremony was to be performed by *vindicta*, after the reason for the emancipation had been held good by a *consilium*, consisting, at Rome, of five senators and five *equites;* in the provinces of twenty *recuperatores*, i.e. judges specially appointed, and who were necessarily Roman citizens. This council sat under the presidency of the prætor at Rome, and of the proconsul in the provinces. (GAI. i. 20.)

The *lex Junia Norbana* was made A.D. 19; and the effect of its provisions, coupled with that of the *lex Ælia Sentia*, was to place those whose emancipation was defective in any one of these three requisites on the footing of *Latini coloniarii.* (GAI. i. 17; see Introd. sec. 38, 39.) The old relation of the Latini in the sense of dwellers in Latium to Rome, some of whom enjoyed the *connubium* and others did not, was terminated by the *lex Julia*, B.C. 90, by which all such *Latini* were made Roman citizens. But the *status* of being a Latin (*Latinitas*), but without the *connubium*, was preserved as an artificial creation of the law, and was bestowed on towns or peoples. The *Transpadani*, for example, received the *Latinitas* in B.C. 89. Those receiving the *Latinitas* were *Latini coloniarii*, and such Latin colonies seem to have existed in the days of Gaius. (GAI. i. 28.) The effect of the *lex Junia Norbana* was to place the *liberti Latini* to whom it applied nearly but not quite on the footing of *Latini coloniarii.*

Latini (*liberti*) *Juniani*, as having this *Latinitas*, might trade with Romans on the footing of Roman citizens, but could not vote at elections or fill public offices, and had not the *connubium*, and therefore their children were not in their power. They could not make a testament, or become heirs, legatees, or guardians under a testament, although they could receive the benefit of *fideicommissa* (GAI. i. 24); and at their death their original owner took their property exactly as if they had never ceased to be slaves. (See Bk. iii. Tit. 7, sec. 4, *ipso ultimo spiritu simul animam atque libertatem amittebant.*) But there were many ways in which a *libertus*, in this position, could attain citizenship: as by an imperial rescript; by holding a magistracy in a Latin colony; by proving before a magistrate his marriage with a Roman or Latin wife, or a person he believed to be a Roman or Latin, and the birth of a son who was a year old; or by going through the ceremony of emancipation again and fulfilling the three conditions requisite (this was called *iteratio*); or by the modes noticed by Ulpian (*Reg.* 3. 1) in the words *militia, nave, ædificio, pistrino*, that is,

by military service, building a ship and carrying wheat for six years, making a building, or establishing a bakeshop. (GAI. i. 22, 23, 24-28, 31; ii. 275; iii. 56, *et seq.*)

The *lex Ælia Sentia* (A.D. 4) provided that slaves who had been guilty of a crime for which they had been put in chains, branded, or put to the torture, should, by emancipation, be only raised to the level of *dediticii*, that is, of people who have surrendered themselves to their conquerors in war. They enjoyed personal liberty, but that was all. They could not trade except on the footing of strangers; could not make a testament; were forbidden to live within a hundred miles of Rome, on pain of being themselves sold, together with all their property; they could never become citizens; and at their death their master took all their property by right of succession if the emancipation had been complete; and, if not, by the right an owner always had to the slave's *peculium*. (GAI. i. 12-15, 25-27; iii. 74-76.) The children of the *Latini Juniani* were Latini, and those of the *dediticii* were *peregrini*, and the patron had no rights over them. (DEMANGEAT, i. 194.)

Where above we speak of a Latin *libertus* holding a magistracy in a Latin colony, or marrying a Latin, i.e. a member of a Latin colony, it must be understood that we are speaking of the law as it stood before the time of Caracalla, when all the free inhabitants of the empire received the *civitas*, and consequently the position of *Latini*, other than *Latini Juniani*, was swept away; and in the same way, after the legislation of Caracalla, there were no *peregrini* (see Introd. sec. 39), but the children of *liberti* in the position of *dediticii* were treated as *peregrini*.

There were thus three classes of freedmen:—1. Those who were citizens; 2. Those who were in the position of *Latini*; 3. Those in the position of *dediticii*. (GAI. i. 12.) But these distinctions were abolished by Justinian, *nullo nec ætatis manumissi nec dominii manumittentis nec in manumissionis modo discrimine habito* (C. vii. 5 and 6); and under his legislation a slave became at once completely free by any act of the owner signifying his intention to bestow liberty. By a Novel (78. 1) Justinian abolished all distinction between *libertini* and *ingenui*, retaining, however, the *jus patronatus*. The *libertus* owed his *patronus* reverence (Dig. xxxvii. 15), and also in many cases had to discharge certain services (Dig. xxxvii. 14) for him; but the chief feature of the *jus patronatus* was the right of the patron to succeed to the inheritance of his *libertus*; for if the *libertus* died childless, the patron succeeded to his whole inheritance, supposing he left no testament; and if he left one, still the patron took a third part of the property, where it exceeded one hundred *aurei*. (Bk. iii. Tit. 7. 3.)

Tit. VI. QUI QUIBUS EX CAUSIS MANUMITTERE NON POSSUNT.

Non tamen cuicunque volenti manumittere licet. Nam is, qui in fraudem creditorum manumittit, nihil agit, quia lex Ælia Sentia impedit libertatem.

It is not, however, every master who wishes that may manumit, for a manumission in fraud of creditors is void, the *lex Ælia Sentia* restraining the power of enfranchisement.

Gai. i. 37.

A person, as the third section informs us, manumitted his slaves in fraud of creditors, who knew that he was insolvent, or that by the manumission he would make himself unable to pay his debts; and in such a case, as the Roman law held that liberty once given could not be revoked, the *lex Ælia Sentia* (A.D. 4) provided that the act of manumission was entirely void (*nihil agit*): the freedom was considered never to have been given. The slave would indeed be treated as free until the creditors attacked the manumission as fraudulent; but directly they did so successfully, he was exactly in the position in which he would have been if never enfranchised. If, however, though the master was insolvent at the time of manumission, his debts were paid before the manumission was attacked, the creditors could no longer impugn the manumission, and the slave was considered to have been free from the date of the manumission. Probably there was a time limited, beyond which creditors were not allowed to attack the manumission. We learn from the Digest that if the manumission was made in fraud of the *fiscus*, it must be impugned within ten years; and it is not probable that the private creditor would have had a longer time allowed him. (Dig. xl. 9. 11.)

1. Licet autem domino, qui solvendo non est, in testamento servum suum cum libertate heredem instituere, ut fiat liber heresque ei solus et necessarius, si modo nemo alius ex eo testamento heres extiterit, aut quia nemo heres scriptus sit, aut quia is, qui scriptus est, qualibet ex causa heres non extiterit. Idque eadem lege Ælia Sentia provisum est, et recte: valde enim prospiciendum erat, ut egentes homines, quibus alius heres extaturus non esset, vel servum suum necessarium heredem habeant, qui satisfacturus esset creditoribus, aut, hoc eo non faciente, creditores res hereditarias servi nomine vendant, nec injuria defunctus afficiatur.

1. A master, who is insolvent, may, however, by his testament, institute a slave to be his heir, at the same time giving him his liberty, so that the slave becoming free may be his only and necessary heir, provided that there is no other heir under the same testament, which may happen, either because no other person was instituted heir, or because the person instituted, from some reason or other, does not become heir. This was wisely established by the above-mentioned *lex Ælia Sentia*: for it was very necessary to provide that men in insolvent circumstances, who could get no other heir, should have a slave as necessary heir, in order that he might satisfy their creditors; or that if he failed to do so, the creditors might sell the property forming part of the inheritance in the name of the slave, so as to prevent the deceased suffering disgrace.

Gai. ii. 154.

The heirs under a Roman testament accepted all the liabilities of the deceased. When, therefore, the debts exceeded the value of the inheritance, the heir named in the testament would probably refuse the inheritance; and if no one would accept the heirship, the creditors stepped in and had the estate sold for their benefit. As this was thought a great stigma on the memory of the deceased, a slave was frequently enfranchised by the testator and named heir; and as the slave could not refuse to take the office upon him (being thence called *heres necessarius*), the sale of the effects, if necessary, was made in his name, and not in that of his master. Of course this could only take place when the slave was the sole heir. If there was any other heir, the slave would not be heir by necessity; and hence, in the text, the expression *solus et necessarius heres* is used. A slave so emancipated became a Roman citizen. (GAI. i. 21.)

2. Idemque juris est et si sine libertate servus heres institutus est. Quod nostra constitutio non solum in domino, qui solvendo non est, sed generaliter constituit nova humanitatis ratione, ut ex ipsa scriptura institutionis etiam libertas ei competere videatur, cum non est verisimile, eum, quem heredem sibi elegit, si prætermiserit libertatis dationem, servum remanere voluisse et neminem sibi heredem fore.

2. The law is the same also when a slave is instituted heir, although his freedom be not expressly given him; for our constitution, in a new spirit of humanity, decides not only with regard to an insolvent master, but generally, that the mere institution of a slave implies the grant of liberty. For it is highly improbable, that a testator, although he has omitted an express gift of freedom, should have wished that the person he has selected as heir should remain a slave, and that he himself should have no heir.

3. In fraudem autem creditorum manumittere videtur, qui vel jam eo tempore, quo manumittit, solvendo non est, vel qui datis libertatibus desiturus est solvendo esse. Prævaluisse tamen videtur, nisi animum quoque fraudandi manumissor habuit, non impediri libertatem, quamvis bona ejus creditoribus non sufficiant: sæpe enim de facultatibus suis amplius quam in his est sperant homines. Itaque tunc intellegimus impediri libertatem, cum utroque modo fraudantur creditores, id est et consilio manumittentis et ipsa re, eo quod bona non suffectura sunt creditoribus.

3. A person manumits in fraud of creditors, who is insolvent at the time that he manumits, or becomes so by the manumission itself. It has, however, been settled that unless the manumittor intended to commit a fraud, the gift of liberty is not invalidated, although his goods are insufficient for the payment of his creditors; for men often hope their circumstances are better than they really are. The gift of liberty is then invalidated only when creditors are defrauded, both by the intention of the manumittor, and in reality; that is to say, by the insufficiency of the effects to meet their claims.

D. xl. 9, 10; xlii. 8. 15.

Fraudis interpretatio semper in jure civili non ex eventu duntaxat, sed ex consilio quoque desideratur. (D. l. 17. 79.) Gaius informs us (i. 47) that *peregrini* were prevented from enfranchising slaves in fraud of creditors, though the other provisions of the *lex Ælia Sentia* did not affect them.

4. Eadem lege Ælia Sentia domino minori annis viginti non aliter manumittere permittitur, quam si vindicta apud consilium justa causa manumissionis adprobata fuerit manumissi.

4. By the same *lex Ælia Sentia*, again, a master, under the age of twenty years, cannot manumit, unless by *vindicta*, and unless this proceeding in regard to the person manumitted has been approved of by the council on some legitimate ground.

GAI. i. 38.

This *consilium* was held on certain days at Rome, and in the provinces sat during a session, on the last day of which cases such as those referred to in the text were determined. (GAI. i. 20.)

5. Justæ autem manumissionis causæ sunt, veluti si quis patrem aut matrem aut filium filiamve aut fratrem sororemve naturales aut pædagogum, nutricem, educatorem aut alumnum alumnamve aut collactaneum manumittat, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa, dum tamen intra sex menses uxor ducatur, nisi justa causa impediat, et qui manumittitur procuratoris habendi gratia, ne minor septem et decem annis manumittatur.

5. Legitimate grounds for manumission are such as these: that the person to be manumitted is father or mother to the manumittor, his son or daughter, his brother or sister, his preceptor, his nurse, his foster-father, his foster-child of either sex, or his foster-brother; that the person is a slave whom he wishes to make his procurator, or female slave whom he intends to marry, provided the marriage be performed within six months, unless prevented by some lawful cause; and provided that the slave who is to be made a procurator, be not manumitted under the age of seventeen years.

GAI. i. 19. 39; D. xl. 2. 11-13.

The most common case of a person emancipating his father and mother, and other near relations, would be when a slave was made heir. Theophilus (paraphr. on this paragraph) gives as an instance of a person enfranchising his brother, the case of a man having a child by a slave and then a son by a legal marriage. The former would be the slave of the latter.

If the marriage was in any way impossible, the minor would not be allowed to enfranchise his female slave; and it was requisite that it should be he himself who intended to marry her.

A procurator (i.e. agent) below the age of seventeen could not represent his principal in any action (D. iii. 1. 1. 3), and it is this probably that makes Justinian here require that the slave should be seventeen years of age in order to be emancipated by a minor.

6. Semel autem causa adprobata, sive vera sive falsa sit, non retractatur.

6. The approval of a ground of manumission once given, whether the reasons on which it is based be true or false, cannot be retracted.

7. Cum ergo certus modus manumittendi minoribus viginti annis dominis per legem Æliam Sentiam constitutus sit, eveniebat, ut, qui quattuordecim annos ætatis expleverit, licet testamentum facere possit et in eo heredem sibi instituere legataque relinquere possit, tamen, si

7. Certain limits being thus assigned by the *lex Ælia Sentia* to the power of persons under the age of twenty to manumit slaves, the result was that any one, who had completed his fourteenth year, might make a testament, institute an heir, and give legacies, and yet that no person,

adhuc minor sit annis viginti, libertatem servo dare non poterat. Quod non erat ferendum, si is, cui totorum bonorum in testamento dispositio data erat, uni servo libertatem dare non permittebatur. Quare nos similiter ei quemadmodum alias res ita et servos suos in ultima voluntate disponere, quemadmodum voluerit, permittimus, ut et libertatem eis possit præstare. Sed cum libertas inæstimabilis est et propter hoc ante vicesimum ætatis annum antiquitas libertatem servo dari prohibebat: ideo nos, mediam quodammodo viam eligentes, non aliter minori viginti annis libertatem in testamento dare servo suo concedimus, nisi septimum et decimum annum impleverit et octavum decimum tetigerit. Cum enim antiquitas hujusmodi ætati et pro aliis postulare concessit, cur non etiam sui judicii stabilitas ita eos adjuvare credatur, ut et ad libertates dandas servis suis possint provenire?

under twenty, could give liberty to a slave. This seemed intolerable: that a man, permitted to dispose of all his effects by testament, could not enfranchise one single slave. We therefore give him the power of disposing, by testament, of his slaves, as of all his other property, exactly as he pleases, so as to be able also to give them liberty. But as liberty is of inestimable value, and our ancient laws, therefore, prohibited any person, under twenty years of age, to give it to a slave, we adopt a middle course, and only permit a person, under twenty years of age, to confer freedom on his slaves by testament, if he has completed his seventeenth and entered on his eighteenth year. For since the ancient law permitted persons at eighteen years of age to plead for others, why should not their judgment be considered sound enough to enable them to give liberty to their own slaves?

GAI. i. 40.

The *lex Ælia Sentia* (A.D. 4) required the manumission given by a minor to be given by the form of *vindicta*. This was held to exclude the minor from giving it by testament. Manumission was something more than the disposal of a piece of property; it was the creation of a citizen, and thus might consistently be denied to minors whose power of disposing of property was unfettered. Justinian, nine years after the Institutes were published, abolished the distinction he establishes in the text, and allowed the minor to give liberty by testament at any time when he could make a testament at all, by a Novel (119. 2), containing the words *sancimus ut licentia pateat minoribus in ipso tempore, in quo eis de reliqua eorum substantia disponere permittitur, etiam servos suos in ultimis voluntatibus manumittere.*

TIT. VII. DE LEGE FURIA CANINIA SUBLATA.

Lege Furia Caninia certus modus constitutus erat in servis testamento manumittendis. Quam quasi libertatibus impedientem et quodammodo invidam tollendam esse censuimus, cum satis fuerat inhumanum, vivos quidem licentiam habere totam suam familiam libertate donare, nisi alia causa impediat libertati, morientibus autem hujusmodi licentiam adimere.

The *lex Furia Caninia* imposed a limit on the number of slaves who could be manumitted by testament; but we have thought right to abolish this law as invidiously placing obstacles in the way of liberty. It seemed very unreasonable to allow persons, in their lifetime, to manumit all their slaves, if there is no special reason to prevent them, and yet to deprive the dying of the like power.

GAI. i. 42-46; C. vii. 3.

The *lex Furia Caninia* was made in the year A.D. 8, four years after the *lex Ælia Sentia*. (SUET. *Aug.* 40.) Its object was to prevent the manumission of crowds of slaves enfranchised in order to gratify the vanity of testators, who wished their funeral train to be swollen with these witnesses to their liberality. It provided that the owner of two slaves might enfranchise both; of from two to ten, half; of from ten to thirty, one-third; of from thirty to one hundred, one-fourth; and of a larger number, one-fifth; but in no case was the number enfranchised to exceed one hundred. The slaves to be manumitted were required to be designated by name. The citizenship was so worthless in the days of Justinian, that it mattered little how many slaves were made free; but in the days of Augustus, the distinction made between the living and the dying master, which Justinian calls *satis inhumanum*, was far from unreasonable. A master might well be trusted not to impoverish himself by reckless manumission during his life, and yet be denied the power of gratifying his vanity at the expense of his heir.

TIT. VIII. DE HIS, QUI SUI VEL ALIENI JURIS SUNT.

Sequitur de jure personarum alia divisio. Nam quædam personæ sui juris sunt, quædam alieno juri subjectæ sunt: rursus earum, quæ alieno juri subjectæ sunt, aliæ in potestate parentum, aliæ in potestate dominorum sunt. Videamus itaque de his, quæ alieno juri subjectæ sunt: nam si cognoverimus, quæ istæ personæ sint, simul intellegemus, quæ sui juris sunt. Ac prius dispiciamus de his, qui in potestate dominorum sunt.

We now come to another division relative to the rights of persons; for some persons are *sui juris*, some are subject to the power of others. Of those, again, who are subject to others, some are in the power of ascendants, others in that of masters. Let us, then, treat of those who are subject to others; for, when we have ascertained who these are, we shall at the same time discover who are *sui juris*. And first let us consider those who are in the power of masters.

GAI. i. 48. 51.

Justinian now passes to the division of persons as members of a family. The head of a Roman family exercised supreme authority over his wife, his children, his children's children, and his slaves. (See Introd. sec. 40.) He was their owner as well as their master. He alone was *sui juris*, and all the other members of the family were *alieni juris*, for they belonged to him. The whole group, that is, the head and those in his power, were the *familia*. The head was the *paterfamilias*, a term not expressive of paternity (D. l. 16. 195. 2), but merely signifying a person who was not under the power of another, and who, consequently, might have others under his power. An unmarried woman whose father was dead, was said to be a *materfamilias*, a term which, in this sense, is only the feminine form of *paterfamilias*. She was *sui juris*, and might have slaves, though of course she could have

no power over persons freeborn. For if she married, her children were in her husband's power, not in hers. (See Introd. sec. 40.)

The word *familia* was used in so many different senses, that it may be as well to collect them here, before entering on the subject of family relations. *Familia* is used to mean,—1. All persons of the blood of the same ancestor; 2. The head of the family and all those in his power whether slaves or free; 3. All connected by agnation (see Introd. sec. 44); 4. The slaves of one man; 5. The property of a *paterfamilias*, of whatever sort. The word is fully explained in a fragment of Ulpian. (D. l. 16. 195.)

Gaius, from whom much of this section is borrowed, says,—*Rursus earum personarum quæ alieno juri subjectæ sunt, aliæ in potestate, aliæ in manu, aliæ in mancipio sunt* (i. 49). The persons *in manu* were those wives who passed through the particular forms of marriage which placed a wife in the position of a daughter to her own husband; that is, the religious ceremony of *confarreatio*, the fictitious sale *coemptio*, and *usus*, or cohabitation unbroken by an absence of three nights in the year. (See Introd. sec. 46.) Persons *in mancipio* were those sold by the head of their family, or by themselves with the form of *mancipatio*. (See Gai. i. 116-123, and Introd. sec. 42.) They were said to be *servorum loco* (not *servi*) with reference to the purchaser, but as to other persons they were free. Such sales were merely fictitious, except in the early days of Rome. The subjection *in manu* had ceased before the time of Justinian, and he did away with the last traces of that *in mancipio*. (See Tit. 12. 6.)

1. In potestate itaque dominorum sunt servi. Quæ quidem potestas juris gentium est: nam apud omnes peræque gentes animadvertere possumus, dominis in servos vitæ necisque potestatem esse, et quodcumque per servum adquiritur, id domino adquiritur.

1. Slaves are in the power of masters, a power derived from the law of nations: for among all nations it may be remarked that masters have the power of life and death over their slaves, and that everything acquired by the slave is acquired for the master.

Gai. i. 52.

The power of the master over his slaves was spoken of as the *dominica potestas*. The origin of this power has been already ascribed to the *jus gentium*. (Tit. 3. 2.)

2. Sed hoc tempore nullis hominibus, qui sub imperio nostro sunt, licet sine causa legibus cognita et supra modum in servos suos sævire. Nam ex constitutione divi Pii Antonini qui sine causa servum suum occiderit, non minus puniri jubetur, quam qui servum alienum occiderit. Sed et major asperitas dominorum ejusdem principis constitutione coercetur. Nam consultus a quibusdam præsidibus provinciarum de his servis, qui ad ædem sacram vel ad statuas principum

2. But at the present day no persons under our rule may use violence towards their slaves, without a reason recognised by the law, or ever to an extreme extent. For, by a constitution of the Emperor Antoninus Pius, he who without any reason kills his own slave, is to be punished equally with one who has killed the slave of another. The excessive severity of masters is also restrained by another constitution of the same emperor. For, when consulted by certain governors of provinces on the subject of slaves, who fled for

confugiunt, præcepit, ut si intolerabilis videatur dominorum sævitia, cogantur servos bonis condicionibus vendere, ut pretium dominis daretur: et recte; expedit enim rei publicæ, ne quis re sua male utatur. Cujus rescripti ad Ælium Marcianum emissi verba hæc sunt: 'Dominorum quidem potestatem in suos servos illibatam esse oportet nec cuiquam hominum jus suum detrahi. Sed dominorum interest, ne auxilium contra sævitiam vel famem vel intolerabilem injuriam denegetur his, qui juste deprecantur. Ideoque cognosce de querellis eorum, qui ex familia Julii Sabini ad statuam confugerunt, et si vel durius habitos quam æquum est, vel infami injuria affectos cognoveris, veniri jube, ita ut in potestatem domini non revertantur. Qui Sabinus, si meæ constitutioni fraudem fecerit, sciet, me admissum severius exsecuturum.'

refuge either to temples, or the statues of the emperors, he decided that if the severity of masters should appear excessive, they might be compelled to make sale of their slaves upon equitable terms, so that the masters might receive the value; and this was a very wise decision, as it concerns the public good that no one should misuse his own property. The following are the terms of this rescript of Antoninus, which was sent to Ælius Marcianus: 'The power of masters over their slaves ought to be preserved unimpaired, nor ought any man to be deprived of his right. But it is for the interest of all masters themselves, that relief prayed on good grounds against cruelty, the denial of sustenance, or any other intolerable injury, should not be refused. Examine, therefore, into the complaints of the slaves who have fled from the house of Julius Sabinus, and taken refuge at the statue of the emperor; and, if you find that they have been too harshly treated, or wantonly disgraced, order them to be sold, so that they may not fall again under the power of their master; and, if Sabinus attempt to evade my constitution, I would have him know, that I shall severely punish his disobedience.'

GAI. i. 53; D. i. 6. 2.

The *lex Cornelia de Sicariis*, passed by Sylla, B.C. 81, made killing the slave of another person punishable as homicide, with death or exile (D. ix. 2. 23. 9); and the text tells us that the provisions of this law were extended by the Emperor Antoninus Pius to the case of a master killing his own slave. The *lex Petronia* (D. xlviii. 8. 11. 2), passed in the time of one of the early emperors, forbad masters to expose their slaves to contests with wild beasts. Hadrian required the sanction of a magistrate in all cases before death was inflicted. (SPART. *in Hadr.* cap. 18; D. i. 6. 2.) Constantine only permitted moderate corporal chastisement to be inflicted, and Justinian in the Code retains his enactment. (C. ix. 14.)

Justinian does not notice the corresponding changes which the clemency of later times worked in the control of the master over the slave's property; according to the usage of these times this property, called *peculium*, belonged in fact, though not in law, to the slave, and he often purchased his liberty with it. (TACIT. *Ann.* xiv. 42; D. xv. 1. 53.)

TIT. IX. DE PATRIA POTESTATE.

In potestate nostra sunt liberi nostri, quos ex justis nuptiis procreaverimus.	Our children, begotten in lawful marriage, are in our power.

GAI. i. 55.

The *patria potestas* differed originally little, if at all, from the *dominica potestas.* If the sense of ownership was not so complete in the former, it was probably limited more by natural feeling than by law. The father could sell, expose, or put to death his children. (Twelve Tables, No. 4; see Introd. sec. 8.) Time, however, ameliorated the position of the child, and all that was left was a power to inflict moderate chastisement (C. viii. 47. 31), and to sell at the time of birth in cases of extreme necessity. (C. iv. 43. 1.) Constantine condemned the father who killed his child to the punishment of a parricide. (C. ix. 17. 1.) The sale of a child was in general fictitious, and only formed the mode by which the child was released from the father's power.

Like that of the slave, the child's property was only a *peculium,* belonging strictly to the father; and whatever the son *in potestate* acquired was acquired for the father, although the son could not make his father's position worse, and the father was not liable for the debts and engagements of the son. But under the early emperors a change was made, and the son had complete ownership in property acquired in war (*castrense peculium*); Constantine made a further exception of property acquired in employments about the court (*quasi-castrense peculium*) (see Bk. ii. 9, and Introd. sec. 41); and Justinian only permitted the father to have the usufruct during his life of everything coming to the son in any way except from the father himself. (Bk. ii. Tit. 9. 1.)

The meaning of *justæ nuptiæ* will appear in the next Title.

Neither age nor marriage terminated the power of a father over his son. As we learn from Tit. 12. 4, the *filiusfamilias* might rise to the highest public dignities, even that of consul, and yet he would remain in the power of his father. If a daughter married *in manu,* she passed from her father's power into that of her husband. The modes in which the *patria potestas* was ended are treated of in Tit. 12 of this Book.

1. Nuptiæ autem sive matrimonium est viri et mulieris conjunctio, individuam consuetudinem vitæ continens.	1. Marriage, or matrimony, is a joining together of a man and woman, carrying with it a mode of life in which they are inseparable.

D. xxiii. 2. 1.

Nuptiæ are properly the ceremonies attending the formation of the legal tie, and *matrimonium* is the tie itself; but the jurists use the two terms quite indifferently, as, for instance, Modestinus says, '*nuptiæ sunt conjunctio maris et feminæ*'. (D. xxiii. 2. 1.)

The *individua consuetudo vitæ* implied a community of rank

and position, and of sacred and human law, *divini et humani juris communicatio* (D. xxiii. 2. 1), but not necessarily of property. Marriage gave neither party any right over the property of the other, except when the wife passed *in manum*, and then all that she had belonged to the husband. For the meaning of *individua* compare Tacitus, *Ann.* vi. 10, 'apud Capreas *individui*' (never parted).

2. Jus autem potestatis, quod in liberos habemus, proprium est civium Romanorum; nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus.

2. The power which we have over our children is peculiar to the citizens of Rome; for no other people have a power over their children, such as we have over ours.

GAI. i. 55.

Gaius mentions the Galatæ as being reported to have had a similar institution. (See also *Galatians* iv. 1.)

3. Qui igitur ex te et uxore tua nascitur, in tua potestate est: item qui ex filio tuo et uxore ejus nascitur, id est nepos tuus et neptis, æque in tua sunt potestate, et pronepos et proneptis et deinceps ceteri. Qui tamen ex filia tua nascitur, in tua potestate non est, sed in patris ejus.

3. The child born to you and your wife is in your power. And so is the child born to your son of his wife, that is, your grandson or granddaughter; so are your great-grandchildren, and all your other descendants. But a child born of your daughter is not in your power, but in the power of its own father.

If a woman, although she was not in the power of her husband, had children, they were not in her power; and hence, as she could have no descendants in her power, it was said, *mulier familiæ suæ et caput et finis est*, i.e. her family ended with herself. (D. l. 16. 195. 5.)

TIT. X. DE NUPTIIS.

Justas autem nuptias inter se cives Romani contrahunt, qui secundum præcepta legum coeunt, masculi quidem puberes, feminæ autem viripotentes, sive patresfamilias sint sive filiifamilias, dum tamen filiifamilias et consensum habeant parentum, quorum in potestate sunt. Nam hoc fieri debere et civilis et naturalis ratio suadet in tantum, ut jussum parentis præcedere debeat. Unde quæsitum est, an furiosi filia nubere aut furiosi filius uxorem ducere possit? Cumque super filio variabatur, nostra processit decisio, qua permissum est ad exemplum filiæ furiosi filium quoque posse et sine patris interventu matrimonium sibi copulare secundum datum ex constitutione modum.

Roman citizens form the tie of lawful marriage with each other when they are united according to law, the males having attained the age of puberty, and the females a marriageable age, whether they are *patresfamilias* or *filiifamilias*; but, if the latter, they must first obtain the consent of their ascendants, in whose power they are. For both natural reason and the law require this consent; so much so, indeed, that it ought to precede the marriage. Hence the question has arisen, whether the daughter of a madman could be married, or his son marry. And as opinions were divided as to the son, we decided that as the daughter of a madman might, so may the son of a madman marry without the intervention of the father, according to the mode established by our constitution.

C. v. 4. 25.

In the earliest times of Roman law there were three modes of forming the tie of marriage: first, *confarreatio*, a religious cere-

mony, in which none but those to whom the *jus sacrum* was open could take part; secondly, *coemptio*, a fictitious sale, in which the wife was sold to the husband; and lastly, *usus*, i.e. cohabitation with the intention of forming a marriage. (GAI. i. 110-114.) All three modes had the same effect on the position of the wife. She always passed *in manum viri.* (See Introd. sec. 46.) This incident of marriage was attached to the marriage by mere cohabitation and lapse of time, on the analogy of the ownership which was acquired in a thing by uninterrupted possession. It was, however, open to the wife to 'break the use'; to prevent, that is, her husband gaining complete power over her by lapse of time: the law of the Twelve Tables declared that, if the wife absented herself from her husband for three nights in the year, the *usus* should be interrupted, and she should remain in her own *familia*, and not pass into that of her husband. This was considered so much more advantageous to the wife, as by passing into the *manus* she occupied the position of a daughter in the power of her husband, and all her property belonged to him, that, even in the latter days of the republic, almost all marriages were formed without the wife passing into the *manus* of her husband. In the time of Justinian she never did so, and the whole distinction of the effect of different modes of marriage had been long obsolete. The *nuptiæ* were equally *justæ* whether the wife passed *in manum* or not. A wife who did not pass *in manum* and who was not emancipated remained in the power of her father, and so she remained, except in regard to the sacred rites of her husband's family, when the marriage was by *confarreatio* under a law passed in the time of Tiberius. (GAI. i. 136.) The wife who passed *in manum* was termed a *materfamilias;* the wife not *in manu* was distinguished as *matrona* until *matrona* came to be used for all married women. (CIC. *Top.* c. 3; AUL. GELL. *Noct. Attic.* 18. 6.)

At no time did these different modes of being married form part of the real tie of marriage; they only decided, when the tie of marriage was formed, what should be the position of the wife. Neither were the religious ceremonies nor the nuptial rites anything more than accessories of that which created the binding relation between the parties. The tie itself was constituted by the consent of the parties—by their intention to become man and wife—being expressed and manifested; and the mode in which it was necessary the manifestation should take place was that the woman should pass into her husband's possession. A man and woman were not married because they lived together, unless they had the intention to be married. *Nuptias non concubitus sed consensus facit.* (D. xxxv. 1. 15.) Neither was the mere expression of a consent sufficient to constitute a marriage. There must be an actual or constructive passing of the woman into the possession of the man. The ordinary sign of this was that she was received into the husband's house, *in domum deduci;* but this was only the usual and most patent sign, and any other clear indication was accepted. If,

for example, the parties were both personally present and formally consented, the woman was taken to have placed herself, or been placed if she was *in manu*, in the possession of the man (C. v. 17. 11), and the marriage tie was formed; while, on the other hand, a marriage could not be effected by a mere written consent between persons not present together, as by letter (D. xxiii. 2. 5), without the woman passing into the man's possession by some separate distinct act, such as being received into his house.

In order that the marriage might have the effect of *justæ nuptiæ*, it was necessary that three conditions should be fulfilled. 1. There must be the consent of the parties duly manifested; 2. The parties must be *puberes*, i.e. the man must be fourteen and the woman twelve years of age; and 3. They must have the *connubium*, or legal power of contracting marriage, which may be regarded under three heads:—1. Under the old law both parties were required to be citizens, or to have had so much of citizenship given them as would enable them to form *justæ nuptiæ*. Various changes were made on this head, which will be noticed under section 11 of this Title. 2. They must not stand within the prohibited degrees of relationship; what these were is discussed in the following paragraphs of this Title. 3. If under the power of any one, they must have obtained that person's consent. The husband was obliged, even though in his grandfather's power, to obtain his father's consent also (D. xxiii. 2. 16. 1); otherwise the grandfather could have eventually increased the number of the father's family without consulting him (D. i. 7. 7), which it was against the spirit of the law to allow, as no one could have a new *suus heres* forced on him by agnation against his will. (See Tit. 11. 7.)

The same reason had caused the doubt adverted to in the text, whether, even if the father was incapable of giving his consent, the son could introduce new members into his father's family. This did not apply to the daughter, who could not introduce new members into her father's family. Justinian, in the Code, prescribed the mode in which marriage might be validly made either by the son or daughter of a madman. The son or daughter of the madman was to submit the proposed marriage to be approved, and the gift to the wife and the *dos* to be fixed, by the *præfectus urbi* at Constantinople, by the *præses* or bishop of the city in the provinces, in the presence of the curator of the madman and his principal relations. Marcus Aurelius had previously provided for the case of children of imbecile persons, *dementes*. (C. v. 4. 25.) Where the rights of the *paterfamilias* were not in question, as when the son was emancipated, it was not necessary to have the father's consent. (D. xxiii. 2. 25.)

If the persons, whose consent was necessary, did not give it, the marriage was absolutely void, and therefore no subsequent consent could ratify it. Thus Justinian says here that the consent, *jussum* (a word denoting the authority of the *paterfamilias*), must precede the marriage. It was not, however, necessary that the consent

should be expressly given. If the *paterfamilias* knew of the marriage and did not oppose it, his assent was presumed (C. v. 4. 5); and if he was absent or a captive for three years, his children might form a marriage which he could not afterwards disapprove of. (D. xxiii. 2. 9. 10.) If both or either of the parties were *impuberes* at the time of the marriage, the marriage, though then invalid, became valid by their living together with the intention of being married after puberty was attained. (D. xxiii. 2. 4.)

1. Ergo non omnes nobis uxores ducere licet: nam quarundam nuptiis abstinendum est. Inter eas enim personas, quæ parentum liberorumve locum inter se optinent, nuptiæ contrahi non possunt, veluti inter patrem et filiam vel avum et neptem vel matrem et filiam vel aviam et nepotem et usque ad infinitum: et si tales personæ inter se coierunt, nefarias atque incestas nuptias contraxisse dicuntur. Et hæc adeo ita sunt, ut, quamvis per adoptionem parentum liberorumve loco sibi esse cœperint, non possint inter se matrimonio jungi, in tantum, ut etiam dissoluta adoptione idem juris maneat: itaque eam, quæ tibi per adoptionem filia aut neptis esse cœperit, non poteris uxorem ducere, quamvis eam emancipaveris.

1. We may not marry every woman without distinction: for with some, marriage is forbidden. Marriage cannot be contracted between persons standing to each other in the relation of ascendant and descendant, as between a father and daughter, a grandfather and his granddaughter, a mother and her son, a grandmother and her grandson; and so on, *ad infinitum*. And, if such persons unite together, they only contract a criminal and incestuous marriage; so much so, that ascendants and descendants, who are only so by adoption, cannot intermarry; and even after the adoption is dissolved the prohibition remains. You cannot, therefore, marry a woman who has been either your daughter or granddaughter by adoption, although you may have emancipated her.

GAI. i. 58, 59.

When two persons were related by being *agnati* to each other, they were exactly in the same relative position, so far as regarded the power of marrying, as if they had been related in the same degree by blood. If the tie of *agnatio* was dissolved by emancipation, the tie of blood, if any, would of course remain, and be a bar to marriage; but if there was no tie of blood, that is, if one of the parties had entered the family by adoption, then, if the emancipated person had, while the *agnatio* subsisted, occupied the position of ascendant or descendant to the other person, marriage was forbidden, but if that of a collateral, it was allowed.

2. Inter eas quoque personas, quæ ex transverso gradu cognationis junguntur, est quædam similis observatio, sed non tanta. Sane enim inter fratrem sororemque nuptiæ prohibitæ sunt, sive ab eodem patre eademque matre nati fuerint, sive ex alterutro eorum. Sed si qua per adop ionem soror tibi esse cœperit, quamdiu quidem constat adoptio, sane inter te et eam nuptiæ consistere non possunt: cum vero per emancipationem adoptio dissoluta sit, pot-

2. There are also restrictions, though not so extensive, on marriage between collateral relations. A brother and sister are forbidden to marry, whether they are the children of the same father and mother, or of one of the two only. And, if a woman becomes your sister by adoption, so long as the adoption subsists, you certainly cannot marry her; but if the adoption is destroyed by emancipation, you may marry her; as you may also, if you yourself are emancipated. Hence it fol-

eris eam uxorem ducere: sed et si tu emancipatus fueris, nihil est impedimento nuptiis. Et ideo constat, si quis generum adoptare velit, debere eum ante filiam suam emancipare: et si quis velit nurum adoptare, debere eum ante filium emancipare.

lows, that if a man would adopt his son-in-law, he ought first to emancipate his daughter; and if he would adopt his daughter-in-law, he ought previously to emancipate his son.

GAI. i. 60, 61; D. xxiii. 2. 17. 1.

To adopt a son-in-law would be to make him brother by agnation of his own wife. Should therefore the adoption take place before the emancipation of the daughter the previous marriage would be invalidated. (D. xxiii. 2. 6.)

3. Fratris vel sororis filiam uxorem ducere non licet. Sed nec neptem fratris vel sororis ducere quis potest, quamvis quarto gradu sint. Cujus enim filiam uxorem ducere non licet, ejus neque neptem permittitur. Ejus vero mulieris, quam pater tuus adoptavit, filiam non videris impediri uxorem ducere, quia neque naturali neque civili jure tibi conjungitur.

3. A man may not marry the daughter of a brother or a sister, nor the granddaughter, although she is in the fourth degree. For when we may not marry the daughter of any person, neither may we marry the granddaughter. But there does not appear to be any impediment to marrying the daughter of a woman whom your father has adopted; for she is not connected with you either by natural or civil law.

D. xxiii. 2. 12. 4.

In the direct line every degree represents a generation. The son is in the first degree with respect to his father; the grandson in the second with respect to his grandfather. In the collateral line the generations are taken first up to, and then down from, the common ancestors. For instance, first cousins are in the fourth degree. From either cousin to his father is one degree, from the father to the grandfather is another, from the grandfather to the father of the other cousin is a third, and from that father to that cousin is a fourth.

The marriage of a man with his brother's daughter had been legalised in favour of Claudius and Agrippina (SUET. *in Claud.* 26; GAI. i. 62); but prohibited by Constantine. (Cod. Theod. i. 2.) Marriage with a sister's daughter was never allowed.

The children of a lawful marriage never followed the family of the mother, and therefore, though she was adopted, remained as they were before. But of course a daughter could not have married an adopted son's son.

4. Duorum autem fratrum vel sororum liberi vel fratris et sororis jungi possunt.

4. The children of two brothers or two sisters, or of a brother and sister, may marry together.

D. xxiii. 2. 3.

The marriage of first cousins, forbidden by preceding emperors, had again been legalised by Arcadius and Honorius. (C. v. 4. 19.)

5. Item amitam, licet adoptivam, uxorem ducere non licet, item ma-

5. So, too, a man may not marry his paternal aunt, even though she is

terteram, quia parentum loco habentur. Qua ratione verum est, magnam quoque amitam et materteram magnam prohiberi uxorem ducere.

so only by adoption; nor his maternal aunt; because they are regarded as being in the place of ascendants. For the same reason, no person may marry his great-aunt, either paternal or maternal.

GAI. i. 62; D. xxiii. 2. 17. 2.

It was of course only possible to be in the same family with an adopted aunt on the father's side. A mother's sister by adoption would be in the family to which the mother belonged by birth, whereas the nephew would be in the family of the father, and therefore *adoptivam* is added to *amitam* only, not to *materteram.*

Every person in the first degree from a common ancestor was considered, so far as regarded marriage, in the position of that ancestor. Thus an aunt, being in the first degree from the grandfather, the common ancestor, was looked upon as standing in the place of that grandfather (*parentis loco habetur*), and could not therefore marry her nephew. A cousin would be in the second degree from the common ancestor, and therefore proximity would not be a bar to the union.

6. Adfinitatis quoque veneratione quarundam nuptiis abstinere necesse est. Ut ecce privignam aut nurum uxorem ducere non licet, quia utræque filiæ loco sunt. Quod scilicet ita accipi debet, si fuit nurus aut privigna: nam si adhuc nurus est, id est si adhuc nupta est filio tuo, alia ratione uxorem eam ducere non poteris, quia eadem duobus nupta esse non potest: item si adhuc privigna tua est, id est si mater ejus tibi nupta est, ideo eam uxorem ducere non poteris, quia duas uxores eodem tempore habere non licet.

6. There are, too, other marriages from which we must abstain, from regard to the ties created by marriage; for example, a man may not marry his wife's daughter, or his son's wife, for they are both in the place of daughters to him; but this must be understood to mean those who have been our stepdaughters or daughters-in-law; for if a woman is still your daughter-in-law, that is, if she is still married to your son, you cannot marry her for another reason, as she cannot be the wife of two persons at once. And if your stepdaughter is still your stepdaughter, that is, if her mother is still married to you, you cannot marry her, because a person cannot have two wives at the same time.

GAI. i. 63.

Affinitas is the tie created by marriage between each person of the married pair and the kindred of the other.

7. Socrum quoque et novercam prohibitum est uxorem ducere, quia matris loco sunt. Quod et ipsum dissoluta demum adfinitate procedit; alioquin si adhuc noverca est, id est si adhuc patri tuo nupta est, communi jure impeditur tibi nubere, quia eadem duobus nupta esse non potest: item si adhuc socrus est, id est si adhuc filia ejus tibi nupta est,

7. Again, a man is forbidden to marry his wife's mother, and his father's wife, because they hold the place of mothers to him; a prohibition which can only operate when the affinity is dissolved; for if your stepmother is still your stepmother, that is, if she is still married to your father, she would be prohibited from marrying you by the common rule of law, which forbids

ideo impediuntur nuptiæ, quia duas uxores habere non potes.

a woman to have two husbands at the same time. So if your wife's mother is still your wife's mother, that is, if her daughter is still married to you, you cannot marry her, because you cannot have two wives at the same time.

GAI. i. 63.

The Institutes do not notice the marriage of a brother and sister-in-law. It was permitted up to the time of Constantine, who forbad it. (Cod. Theod. i. 2.) The prohibition was renewed by Valentinian, Theodosius, and Arcadius. (C. v. 5. 5.)

8. Mariti tamen filius ex alia uxore et uxoris filia ex alio marito, vel contra, matrimonium recte contrahunt, licet habeant fratrem sororemve ex matrimonio postea contracto natos.

8. The son of a husband by a former wife, and the daughter of a wife by a former husband, or the daughter of a husband by a former wife, and the son of a wife by a former husband, may lawfully contract marriage, even though they have a brother or sister born of the second marriage.

9. Si uxor tua post divortium ex alio filiam procreaverit, hæc non est quidem privigna tua, sed Julianus hujusmodi nuptiis abstinere debere ait: nam nec sponsam filii nurum esse nec patris sponsam novercam esse, rectius tamen et jure facturos eos, qui hujusmodi nuptiis se abstinuerint.

9. The daughter of a divorced wife by a second husband is not your step-daughter; and yet Julian says we ought to abstain from such a marriage. For the woman betrothed to your son is not your daughter-in-law; nor is the woman betrothed to you your son's stepmother; and yet it is more decent and more in accordance with law to abstain from such marriages.

D. xxiii. 2. 12. 1, *et seq.*

The *sponsalia* constituted in no way a binding tie. They were, as far as law went, mutual promises to contract a tie. *Sponsalia sunt sponsio et repromissio nuptiarum futurarum.* (D. xxiii. 1. 1.) All that was necessary was, that the parties, and their respective *patresfamilias*, should consent, and that the betrothed should have attained the age of seven years. Either party wishing to renounce the engagement, which, by law, was always permissible, could do so by announcing the wish in these words—*conditione tua non utor*, and forfeiting the *arrhæ*, i.e. things given as earnest or security that the promise should be kept, if any had been given. Hence it could only be custom founded on a respect for *boni mores* that prevented a father marrying his son's betrothed, or a son his father's.

10. Illud certum est, serviles quoque cognationes impedimento esse nuptiis, si forte pater et filia aut frater et soror manumissi fuerint.

10. It is certain that the relationships of slaves are an impediment to marriage, if the father and daughter, or brother and sister, as the case may be, have been enfranchised.

D. xxiii. 2. 14. 2.

The union of slaves, *contubernium*, was not recognised in law as a marriage, but still the law did not permit natural ties to be

violated in the case of slaves, any more than in the case of the issue of concubinage, or that of illicit commerce. (C. v. 4. 4.) Of course a manumission must have taken place, or there could be no question of *nuptiæ* ; but if slaves were freed, then, although competent to contract a marriage, they were bound by the ties of blood, and could not marry any one connected with them by close natural relationship.

11. Sunt et aliæ personæ, quæ propter diversas rationes nuptias contrahere prohibentur, quas in libris digestorum seu pandectarum ex veteri jure collectarum enumerari permisimus.

11. There are other persons also between whom marriage is prohibited for different reasons, which we have permitted to be enumerated in the books of the Digests or Pandects, collected from the old law.

D. xxiii. 2. 44. pr. and 1.

The reasons referred to are not, like the preceding, founded on nearness of relationship or other tie, but on public or political grounds. The *patres* and *plebs* could not intermarry till the *lex Canuleia.* (B.C. 444.) (See Introd. sec. 9.) Nor the freeborn and freedmen till the *lex Julia et Papia Poppæa.* (A.D. 9.) (D. xxiii. 2. 23.) This law prohibited the marriage of senators with freedwomen, but allowed that of other freeborn, forbidding at the same time all freeborn to marry actresses or women of openly bad character. (D. xxiii. 2. 41.) Constantine extended the prohibition as regarded persons of high rank to marrying freewomen of the lowest class, *humiles abjectæve personæ.* (C. v. 27. 1.) This was repealed by Justinian. (Nov. 117. 6.) The guardian could not marry his ward before she was twenty-six years of age, unless betrothed or given to him by her father. (D. xxiii. 2. 66.) The governor of a province could not, while he held his office, marry a native of that province (D. xxiii. 2. 38. 57), lest he should abuse his authority. The ravisher could not marry the woman he violated. (C. ix. 13. 2.) Nor the adulterer his accomplice. (Nov. 134.) Nor a Jew a Christian. (C. i. 9. 6.)

While the distinction between *Latini* (*coloniarii*) and *cives* remained in force, a citizen had not *connubium*, and therefore could not contract *justæ nuptiæ*, with a *Latina* or a *peregrina* unless he received permission from the emperor to contract *justæ nuptiæ* with such a person, a permission which Gaius tells us was often accorded to veterans. (GAI. i. 57 ; ULP. *Reg.* v. 4.) But the unauthorised union of a citizen with a *Latina* or *peregrina* was recognised as *matrimonium*, though not as *justæ nuptiæ.* The wife was termed in such a case *injusta uxor.* None of the rules of law as to *patria potestas* and *dos* applied to such a union, but the breach of the tie would be looked on as adultery. (D. xlviii. 5. 13. pr. 1.)

12. Si adversus ea, quæ diximus, aliqui coierint, nec vir nec uxor nec nuptiæ nec matrimonium nec dos intellegitur. Itaque ii, qui ex

12. If persons unite themselves in contravention of the rules thus laid down, there is no husband or wife, no nuptials, no marriage, nor marriage

eo coitu nascuntur, in potestate patris non sunt, sed tales sunt, quantum ad patriam potestatem pertinet, quales sunt ii, quos mater vulgo concepit. Nam nec hi patrem habere intelleguntur, cum his etiam incertus est: unde solent filii spurii appellari, vel a Græca voce quasi σποράδην concepti, vel quasi sine patre filii. Sequitur ergo, ut et dissoluto tali coitu nec dotis exactioni locus sit. Qui autem prohibitas nuptias coeunt, et alias pœnas patiuntur, quæ sacris constitutionibus continentur.

portion, and the children born in such a connection are not in the power of the father. For, with regard to the power of a father, they are in the position of children conceived in prostitution, who are looked upon as having no father, because it is uncertain who he is; and are therefore called *spurii*, either from a Greek word σποράδην, meaning 'at hazard,' or as being *sine patre*, without a father. On the dissolution, therefore, of such a connection, there can be no claim made for the demand of a marriage portion. Persons who contract prohibited marriages are liable also to further penalties set forth in our imperial constitutions.

GAI. i. 64; D. i. 5. 23; D. xxiii. 2. 52.

Under the head of *stuprum* the Romans included every union of the sexes forbidden by morality. Different punishments awaited the guilty according to the degree of crime implied in the union. (Cod. v. 5. 4.) But the law recognised and regulated in concubinage (*concubinatus*) a permanent cohabitation, though without the sanction of marriage, between parties to whose marriage there was no legal obstacle. In every case where such an obstacle existed, unless the obstacle was one merely founded on public policy, such as that of being governor of a province, who was not permitted to marry a native of that province, the law inflicted a punishment on parties cohabiting in defiance of law. During the later Empire, the chief incident of the Roman *concubinatus*, which was so far restricted that a man could not have two concubines at once, or a wife and a concubine, was, that the children could be legitimatised, and so placed on a footing with the offspring of a legal marriage. (See next section.) Between the formation of such a union, and the contracting of a legal marriage, there seems to have been no difference except what rested in the intention of the parties. If two persons lived together, it was the intention with which they did so that decided whether the union was concubinage or marriage. *Concubinam ex sola animi destinatione æstimari oportet.* (D. xxv. 7. 4.) If there was no *affectio maritalis*, no intention to treat the woman as a wife, she was not a wife. Of course, practically, the question of consent was seldom, if ever, left doubtful. Generally speaking, an instrument fixing the amount settled respectively by the husband and wife, was drawn up, and the consent was publicly given in the presence of friends. And as concubinage was a dishonourable state, the presumption in favour of marriage, when the woman was of honest parentage and of good character, was very strong. To the union of concubinage none of the incidents of marriage attached. No *dos* could be asked for, no *donatio* was made by the man: the children were not in the power of the father.

In a legal marriage, without *conventio in manum*, the marriage portion of the wife (*dos*) belonged to the husband during the continuance of the marriage. In early times his power over the *dos* was unrestricted, but afterwards successive limitations of this power were introduced. (See Bk. ii. Tit. 7. 3; Tit. 8. pr.) The settlement on the wife by the husband (*donatio propter nuptias*) belonged, during the marriage, to the wife, but was managed by the husband. (See Bk. ii. Tit. 7. 3.) Divorce was always permitted if either party ceased to wish to preserve the tie of marriage, which was only looked on as a contract resting on mutual consent. A woman *in manu* could not divorce herself from her husband, while a woman, not *in manu* but in the *potestas* of her father, might be divorced from her husband by her father, though Marcus Aurelius forbad the father to exercise his power except for some grave reasons. (Cod. v. 17. 5.) Unless, however, both parties consented to a divorce, heavy penalties were attached to its being insisted on by one alone, unless any of the grounds for divorce established by law, such as adultery or criminal conduct (Cod. v. 17. 8), could be shown to exist; and, by the *lex Julia de adulteriis*, the fact of repudiation had to be established by the presence of seven citizens as witnesses, and a *libellus repudii*. After the divorce either party might, after a fixed interval, marry again, until, at a late period of Roman law, this power of re-marriage was curtailed by the Theodosian code. (Cod. Th. iii. 16. 2.)

13. Aliquando autem evenit, ut liberi quidem statim, ut nati sunt, in potestate parentum non fiant, postea autem redigantur in potestatem. Qualis est is, qui dum naturalis fuerat, postea curiæ datus potestati patris subicitur. Nec non is, qui a muliere libera procreatus, cujus matrimonium minime legibus interdictum fuerat, sed ad quam pater consuetudinem habuerat, postea ex nostra constitutione dotalibus instrumentis compositis, in potestate patris efficitur: quod et alii si ex eodem matrimonio fuerint procreati, similiter nostra constitutio præbuit.

13. It sometimes happens that children who at their birth were not in the power of their father, are brought under it afterwards. Such is the case of a natural son, who is given to the *curia*, and then becomes subject to his father's power. Again, a child born of a free woman, with whom marriage was not prohibited by any law, but with whom the father only cohabited, will likewise become subject to the power of his father if at any time afterwards dotal instruments are drawn up according to the provisions of our constitution. And this constitution carries with it the same result as to any other children who may be subsequently born of the same marriage.

Gai. i. 65; C. v. 27. 10.

By legitimation the offspring of concubinage were placed in the position of *liberi legitimi*, and this was effected in three ways: 1. By oblation to the *curia*; 2. By the subsequent marriage of the parents; and 3. By a rescript of the emperor, a mode introduced by Justinian in the 74th Novel. The *curia* was the class from which, in provincial towns, the magistrates were eligible. To be a member was a distinction, but an onerous one, from the expenses and burdens attached to the position. In order to prevent

the order decaying through unwillingness to incur the expenses attending it, Theodosius and Valentinian permitted citizens, whether themselves members of the *curia* or not, to present their children born in concubinage to, and make them members of, the order (Cod. v. 27. 3), by which they became legitimate, and the heirs of their father. This mode of legitimation, which could, of course, only be adopted when the parents were rich, did not, however, make the children complete members of the father's family. They became his legitimate children, but gained no new relationship or right of succession to any other member of his family. (C. v. 27. 9.)

Constantine first established that natural children should be made legitimate by the subsequent marriage of their parents. Justinian required that at the moment of conception the parents should have been capable of a legal marriage; that an instrument settling the *dos* (*instrumentum dotale*), or, at least, attesting the marriage (*instrumentum nuptiale*), should be drawn up, and that the children should ratify the legitimation, for no one was made legitimate against his will. (Nov. 89. 11.)

If the mother was dead or had disappeared, and the marriage was thus impossible, Justinian enacted that the natural children (if there was no legitimate one) might, by an imperial rescript, be placed in the position they would have held if the marriage had taken place; and this rescript might be given to the children after the father's death, if the father, by his testament, expressed his wish to that effect. (Nov. 89. 9. 10.)

The readings of the last sentence of the text are very various, and Huschke inserts *non* before *fuerint procreati;* but the meaning of the passage would then be so obscure that it seems necessary to retain the reading adopted in most texts.

TIT. XI. DE ADOPTIONIBUS.

Non solum tamen naturales liberi secundum ea, quæ diximus, in potestate nostra sunt, verum etiam ii, quos adoptamus.

Not only are our natural children, as we have said, in our power, but those also whom we adopt.

GAI. i. 97.

Before the time of Justinian, the effect of adoption (see Introd. sec. 42) was to place the person adopted exactly in the position he would have held had he been born a son of the person adopting him. All the property of the adoptive son belonged to his adoptive father. The adoptive son was heir to his adoptive father, if intestate, bore his name (retaining, however, the name of his own *gens* with the change of *-us* into *-anus*, as Octavius, Octavianus), and shared the sacred rites of the family he entered.

Naturales liberi is here opposed to *adoptivi*, not, as in the last Title, to *legitimi*.

1. Adoptio autem duobus modis fit, aut principali rescripto aut imperio magistratus. Imperatoris auctoritate adoptamus eos easve, qui quæve sui juris sunt. Quæ species adoptionis dicitur adrogatio. Imperio magistratus adoptamus eos easve, qui quæve in potestate parentum sunt, sive primum gradum liberorum optineant, qualis est filius filia, sive inferiorem, qualis est nepos neptis, pronepos proneptis.

1. Adoption takes place in two ways, either by imperial rescript, or by the authority of the magistrate. The imperial rescript gives power to adopt persons of either sex who are *sui juris;* and this species of adoption is called *arrogation*. By the authority of the magistrate we may adopt persons of either sex in the power of an ascendant, whether in the first degree, as sons and daughters, or in an inferior degree, as grandchildren or great-grandchildren.

GAI. i. 98, 99.

A public character was always attached in ancient Roman law to so important an alteration in families as adoption. (See Introd. sec. 42.) The sanction of the *curiæ* was probably necessary to its validity, when the family of a member of the *curiæ* was affected. If the person adopted was *sui juris*, his entry into a new family (*arrogatio*) was jealously watched, as the *pontifices* would never allow it where there was any likelihood of the sacred rites of the family he quitted becoming extinct by his departure from it. The form of gaining the consent of the *curiæ* was even continued when the *curiæ* were only represented by thirty lictors, until the rescript of the emperor was substituted as a means of effecting arrogations.

What were the forms of arrogation, when neither the person arrogated nor the person arrogating belonged to the body of the *curiæ*, we have no certain knowledge; but we may guess that arrogation was effected by a fictitious suit, in which the person arrogated was claimed as the child of the arrogator, and let judgment go by default.

If the person adopted was under the power of another, the person under whose power he was had to release him from that power, which he did by selling him (*mancipatio*) three several times, which destroyed his own *patria potestas* (see Introd. sec. 42), and then giving him up to the adopting parent by a fictitious process of law, called '*in jure cessio*,' in which he was claimed and acknowledged as the child of the person who adopted him, and pronounced to be so by the magistrate before whom the proceeding was held (*imperio magistratus*). The word *adoptio* was common to both processes, both to *arrogatio*, said by Gaius to be derived from *rogo*, because the consent of the person arrogating, of the person arrogated, and of the *populus*, was asked (GAI. i. 99), and to *adoptio* in its more limited sense of the adoption of a person not *sui juris*. For the ceremonies previously required for the adoption of a person *alieni juris*, Justinian substituted the simple proceeding of executing, in presence of a magistrate, a deed, declaring the fact of the adoption—the parties to the adoption, that is, the person giving, the person given, and the person receiving, being personally present to give their consent. But it was sufficient if the consent of the party adopted was expressed by

his not declaring his dissent—*non contradicente.* (C. viii. 48. 11; Tit. 12. 8.)

2. Sed hodie ex nostra constitutione, cum filiusfamilias a patre naturali extraneæ personæ in adoptionem datur, jura potestatis naturalis patris minime dissolvuntur nec quidquam ad patrem adoptivum transit nec in potestate ejus est, licet ab intestato jura successionis ei a nobis tributa sunt. Si vero pater naturalis non extraneo, sed avo filii sui materno, vel si ipse pater naturalis fuerit emancipatus, etiam paterno, vel proavo simili modo paterno vel materno filium suum dederit in adoptionem: in hoc casu quia in unam personam concurrunt et naturalia et adoptionis jura, manet stabile jus patris adoptivi, et naturali vinculo copulatum et legitimo adoptionis modo constrictum, ut et in familia et in potestate hujusmodi patris adoptivi sit.

2. But now, by our constitution, when a *filiusfamilias* is given in adoption by his natural father to a stranger, the power of the natural father is not dissolved; no right passes to the adoptive father, nor is the adopted son in his power, although we allow such son the right of succession to his adoptive father dying intestate. But if a natural father should give his son in adoption not to a stranger, but to the son's maternal grandfather; or, supposing the natural father has been emancipated, if he gives the son in adoption to the son's paternal grandfather, or to the son's paternal great-grandfather; or if the natural father gives the son in adoption to the son's maternal grandfather, then in these cases, as the rights of nature and adoption concur in the same person, the power of the adoptive father, knit by natural ties and strengthened by a legal form of adoption, is preserved undiminished, so that the adopted son is both in the family, and in the power, of his adoptive father.

C. viii. 48. 10.

The change made by Justinian in the law of adoption (C. viii. 48. 10) completely altered its character. It used sometimes to happen under the old law, that a son lost the succession to his own father by being adopted, and to his adoptive father by a subsequent emancipation. Justinian wished to remedy this effectually. He therefore provided that the son given in adoption to a stranger, that is, any one not an ascendant, should be in the same position to his own father as before, but gain by adoption the succession to his adoptive father, if the adoptive father died intestate. The adoptive father was not, however, bound, like the natural father (Bk. ii. Tit. 18), to leave him a share of his property, if he made a will. In this kind of adoption, which commentators have termed the *adoptio minus plena,* the adoptive son still remained in the family of his natural father; and the only change which adoption caused was, that he acquired a right of succession to his adoptive father, if intestate. (Bk. iii. Tit. 1. 14.)

When the person to whom the adoptive son was given, was one of his own ascendants, then the old law was permitted to regulate the effects of the adoption, and the adoption in this case was what the commentators term *adoptio plena.* The adoptive son entered the family of the ascendant, who became his adoptive father. A grandson was not naturally in the same family with his maternal grandfather, and could only enter the family of his

maternal grandfather by being adopted. If he had been born after his father had been emancipated, he would not be in the same family with his paternal grandfather, who might therefore wish to adopt him. It was even possible that he might be adopted by his own father; for if born before his father was emancipated, his grandfather might have emancipated his father without emancipating him, and then might afterwards have given him in adoption to his father.

3. Cum autem impubes per principale rescriptum adrogatur, causa cognita adrogatio permittitur et exquiritur causa adrogationis, an honesta sit expediatque pupillo, et cum quibusdam condicionibus adrogatio fit, id est ut caveat adrogator personæ publicæ, hoc est tabulario, si intra pubertatem pupillus decesserit, restituturum se bona illis, qui, si adoptio facta non esset, ad successionem ejus venturi essent. Item non alias emancipare eos potest adrogator, nisi causa cognita digni emancipatione fuerint et tunc sua bona eis reddat. Sed et si decedens pater eum exheredaverit vel vivus sine justa causa eum emancipaverit, jubetur quartam partem ei suorum bonorum relinquere, videlicet præter bona, quæ ad patrem adoptivum transtulit et quorum commodum ei adquisivit postea.

3. When any one, under the age of puberty, is arrogated by imperial rescript, the arrogation is only allowed when inquiry has been made into the circumstances of the case. It is asked, what is the motive leading to the arrogation, and whether the arrogation is honourable and expedient for the pupil. And the arrogation is always made under certain conditions: the arrogator is obliged to give security to a public person, that is, a notary, that if the pupil should die within the age of puberty, he will restore all the property to those who would have succeeded him if no adoption had been made. Nor, again, can the arrogator emancipate the person arrogated, unless, on examination into the case, it appears that the latter is worthy of emancipation; and then the arrogator must restore the property belonging to the person he emancipates. Also, if the arrogator, on his deathbed, has disinherited his arrogated son, or, during his life, has emancipated him without just cause, he is obliged to give up to him the fourth part of all his goods, besides what the son brought to him at the time of arrogation, or has acquired for him afterwards.

Gai. i. 102; D. i. 7. 18; D. xxxviii. 5. 13.

Formerly neither women nor children under the age of puberty could be arrogated. Arrogation was first permitted in the case of the latter by Antoninus Pius (Ulp. *Reg.* viii. 5), but only after strict inquiry had been made into the circumstances of the case. When arrogation by imperial rescript was introduced, women also might be arrogated. (D. i. 7. 21.) Besides the general inquiry which took place in every case of adoption, as to the ages of the parties, and the possible injustice to other members of the family, to which the introduction of a new member might give rise, in the case of an *impubes* inquiry was made whether the character and circumstances of the proposed arrogator were such as to make it probable that the arrogation would be beneficial to the person arrogated. Further, certain regulations were made, designed to protect the property of the *impubes*, which were briefly as follows:—1. If the

arrogated son died before puberty, the arrogator had to restore the property of the son to that son's natural heirs. 2. If the arrogated son was disinherited or was emancipated without good reason before puberty, the arrogated son received back all his own property, and also received one-fourth of the property of the arrogator, called the *quarta D. Pii*, or *quarta Antonina*, as having been first required by that emperor. 3. If the son was emancipated before puberty for a good reason, the son received his own property from the arrogator, but nothing more. 4. Lastly, if the arrogated son, on attaining puberty, wished to rescind the arrogation, he was at liberty to do so, if he could show it was prejudicial to him. Under Justinian arrogated persons and persons adopted by ascendants were treated as *cognati* in the succession to the natural father (Bk. iii. Tit. 5. 3); and, in the intestate succession to the arrogated son, the arrogator was postponed to the children and brothers and sisters of the arrogated son (Bk. iii. Tit. 10. 2), and the arrogator had only the usufruct of the property of the arrogated son while the arrogated son was living.

There is some little doubt when arrogation was first made *per rescriptum principale*. However, Ulpian (*Reg.* viii. 5) expresses himself too plainly to admit of a doubt that in his time arrogation was made *per populum* (i.e. by the *curiæ* represented by lictors), and not by imperial licence. He further adds, that arrogation was only made at Rome (*Reg.* viii. 4), but, of course, when the system of permitting it by imperial rescript was adopted, place could have nothing to do with arrogation.

The *tabularii* here spoken of were public notaries, who kept public registers (*tabulæ*), on which formal acts were recorded.

4. Minorem natu non posse majorem adoptare placet: adoptio enim naturam imitatur, et pro monstro est, ut major sit filius quam pater. Debet itaque is, qui sibi per adrogationem vel adoptionem filium facit, plena pubertate, id est decem et octo annis præcedere.

4. A younger person cannot adopt an older; for adoption imitates nature; and it seems unnatural, that a son should be older than his father. Any one, therefore, who wishes either to adopt or arrogate a son, should be the elder by the term of complete puberty, that is, by eighteen years.

D. i. 7. 15. 3; D. i. 7. 16; D. i. 7. 40. 1.

As long as the required number of years intervened, there was no further positive rule as to age; but it being in the discretion of the emperor to allow arrogation or not, there was generally a disposition to refuse it unless the person who wished to adopt was of such an age, or in such physical circumstances, as to make it improbable he should have children of his own. (D. i. 7. 15.) But unmarried persons might adopt. (D. i. 7. 30.)

The legal age of puberty in males was fourteen; but eighteen was the age at which the body was considered to be fully developed in all cases, *plena pubertas*.

5. Licet autem et in locum nepotis vel neptis vel in locum prone-

5. But a person may adopt another as grandson or granddaughter, great-

potis vel proneptis vel deinceps adoptare, quamvis filium quis non habeat.

grandson or great-granddaughter, or any other descendant, although he has no son.

It would have seemed, without express enactment, that a person, to have a grandson in his power, must have or have had a son, as the sons of his daughter would not be in his power. But, as we know, the maternal grandfather might adopt. With respect to the degrees of marriage, it sometimes made an important difference whether a person was adopted as a son or grandson. The natural (i.e. non-adoptive) granddaughter, for instance, of the person adopting would be cousin or niece of the person adopted, according as he was adopted as a grandson or son, and might marry him in the one case, and not in the other.

6. Et tam filium alienum quis in locum nepotis potest adoptare, quam nepotem in locum filii.

7. Sed si quis nepotis loco adoptet, vel quasi ex eo filio, quem habet jam adoptatum, vel quasi ex illo, quem naturalem in sua potestate habet: in eo casu et filius consentire debet, ne ei invito suus heres adgnascatur. Sed ex contrario si avus ex filio nepotem dat in adoptionem, non est necesse filium consentire.

6. A man may adopt the son of another as his grandson, and the grandson of another as his son.

7. If a man adopts a grandson to be the son of a son already adopted, or of a natural son in his power, the consent of this son ought first to be obtained, that he may not have a *suus heres* given him against his will. But, on the contrary, if a grandfather gives in adoption his grandson by a son, the consent of the son is not necessary.

D. i. 7. 6. 10. 11; D. xxxiii. i. 16. 1.

A grandson could be adopted either generally, when he was supposed to be the issue of a deceased son, and so was *sui juris* at the death of the grandfather; or specially, as the son of a particular son, in which case he came under that son's power when the grandfather died. The grandfather could at his pleasure diminish, but could not add to, the number of his son's family: because otherwise the son would have had a *suus heres* (see Introd. sec. 77) forced on him against his will, to take a share of his property.

8. In plurimis autem causis adsimilatur is, qui adoptatus vel adrogatus est, ei, qui ex legitimo matrimonio natus est. Et ideo si quis per imperatorem sive apud prætorem vel apud præsidem provinciæ non extraneum adoptaverit, potest eundem alii in adoptionem dare.

8. He who is either adopted or arrogated is assimilated, in many points, to a son born in lawful matrimony: and therefore, if any one adopts by imperial rescript, or if he adopts before the prætor or the *præses* of a province, any one who is not a stranger, he can afterwards give in adoption to another the person whom he has adopted.

Gai. i. 105.

The text says that the adoptive son is assimilated to the natural *in plurimis causis*, and not altogether; because, among other differences, if the adoptive son left his adoptive family, he ceased to have any relationship whatever to its members; but the

natural son was always *cognatus* to his own blood relations; although, by emancipation or adoption, he might cease to be *agnatus* to them.

Under Justinian's legislation the person adopting a stranger had no *patria potestas* over him at all, and therefore could not exercise such a power as that of giving his adoptive son in adoption to another person. If the adoption was made by imperial rescript, if, that is, it was an arrogation that took place, the arrogator had the *patria potestas* in all cases.

When once the tie of adoption was dissolved, all the relations created by it were entirely at an end, except that marriage was forbidden between the person adopting and the person adopted. (See Tit. 10. 1.) *In omni fere jure, finita patris adoptivi potestate, nullum ex pristino jure retinetur vestigium.* (D. i. 7. 13.) But the tie could never again be renewed between the same persons. (D. i. 7. 37. 1.)

9. Sed et illud utriusque adoptionis commune est, quod et hi, qui generare non possunt, quales sunt spadones, adoptare possunt, castrati autem non possunt.

9. It is a rule common to both kinds of adoption, that persons, although incapable of procreating, as, for instance, impotent persons, may, but those who are castrated, cannot, adopt.

GAI. i. 103.

The distinction was drawn because it was considered as never perfectly certain that the former (*spadones*) would not at some time or other have children of their own.

10. Feminæ quoque adoptare non possunt, quia nec naturales liberos in potestate sua habent: sed ex indulgentia principis ad solatium liberorum amissorum adoptare possunt.

10. Women, also, cannot adopt; for they have not even their own children in their power; but by the indulgence of the emperor, as a comfort for the loss of their own children, they are allowed to adopt.

GAI. i. 104; C. viii. 48. 5.

Women could not adopt, because the meaning of adoption was that the person adopted passed into the *patria potestas* of the person adopting. The adoption mentioned in the text (which was permitted by a constitution of Diocletian and Maximian, C. viii. 48. 5), only placed the adopted children in the same relation to the woman as her own children would have held. She gained nothing like *patria potestas* over them.

11. Illud proprium est illius adoptionis, quæ per sacrum oraculum fit, quod is, qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subicitur, sed etiam liberi ejus in ejusdem fiunt potestate tamquam nepotes. Sic enim et divus Augustus non ante Tiberium adoptavit, quam is Germanicum adoptavit: ut protinus

11. Adoption by the rescript of the emperor has this peculiarity. If a person, having children under his power, should give himself in arrogation, not only does he submit himself to the power of the arrogator, but his children are also in the arrogator's power, being considered his grandchildren. It was for this reason that Augustus did not adopt Tiberius until Tiberius

adoptione facta incipiat Germanicus Augusti nepos esse.

had adopted Germanicus; so that directly the adoption was made, Germanicus became the grandson of Augustus.

GAI. 1. 107.

This is said to be an incident of arrogation only, because when a person not *sui juris* was adopted, his children were not in his power, and so he could not transfer them to the power of his adoptive father; into which they only came after the death of the person in whose power their own natural father was.

All the property of the person arrogated became, before Justinian's time, the property of the arrogator. (See Bk. iii. Tit. 10.) The adoptive son, as he was previously in the power of his natural father, had no property to pass.

12. Apud Catonem bene scriptum refert antiquitas, servi si a domino adoptati sint, ex hoc ipso posse liberari. Unde et nos eruditi in nostra constitutione etiam eum servum, quem dominus, actis intervenientibus, filium suum nominaverit, liberum esse constituimus, licet hoc ad jus filii accipiendum ei non sufficit.

12. Cato, as we learn from the ancients, has with good reason written, that slaves, when adopted by their masters, are thereby made free. In accordance with which opinion, we have decided by one of our constitutions, that a slave to whom his master by a solemn deed gives the title of son is thereby made free, although he does not acquire thereby the rights of a son.

C. vii. 6. 10.

It is doubtful whether slaves could be adopted, so as to become members of the family of the person adopting them. Aulus Gellius (*Noct. Attic.* v. 19) says that the majority of the ancient jurists, including Sabinus, held that they could. Theophilus says Cato was of the contrary opinion. They certainly became freedmen, and never *ingenui*, by adoption; even a freedman never became *ingenuus* by adoption (D. i. 7. 46), and he could only be adopted by his patron (D. i. 7. 15), and on a good ground, such as the patron having no children. (C. viii. 48.)

TIT. XII. QUIBUS MODIS JUS POTESTATIS SOLVITUR.

Videamus nunc, quibus modis ii, qui alieno juri subjecti sunt, eo jure liberantur. Et quidem servi quemadmodum potestate liberantur, ex his intellegere possumus, quæ de servis manumittendis superius exposuimus. Hi vero, qui in potestate parentis sunt, mortuo eo sui juris fiunt. Sed hoc distinctionem recipit. Nam mortuo patre sane omnimodo filii filiæve sui juris efficiuntur. Mortuo vero avo non omnimodo nepotes neptesque sui juris fiunt, sed ita, si post

Let us now inquire in what ways persons in the power of others are freed from it. How slaves are freed from the power of their masters may be learnt from what we have already said with regard to manumission. Those who are in the power of an ascendant become *sui juris* at his death; a rule, however, which admits of a distinction. For when a father dies, his sons and daughters become undoubtedly *sui juris;* but when a grandfather dies, his grandchildren do not

mortem avi in potestatem patris sui recasuri non sunt: itaque, si moriente avo pater eorum et vivit et in potestate patris sui est, tunc post obitum avi in potestate patris sui fiunt: si vero is, quo tempore avus moritur, aut jam mortuus est aut exiit de potestate patris, tunc hi, quia in potestatem ejus cadere non possunt, sui juris fiunt.

necessarily become *sui juris*, but only if on the grandfather's death they do not fall under the power of their father. Therefore, if their father is alive at the death of their grandfather, and was in his power, then, on the grandfather's death, they become subject to the power of their father. But, if at the time of the grandfather's death their father is either dead, or has already passed out of the grandfather's power by emancipation, then, as they cannot fall under the power of their father, they become *sui juris*.

GAI. i. 124-127.

The modes in which the *patria potestas* was ended were—1. The death of the parent; 2. The parent or son suffering loss of freedom or of citizenship; 3. The son attaining certain dignities; 4. Emancipation. All these modes are treated of in this Title.

1. Cum autem is, qui ob aliquod maleficium in insulam deportatur, civitatem amittit, sequitur ut, quia eo modo ex numero civium Romanorum tollitur, perinde ac si mortuo eo desinant liberi in potestate ejus esse. Pari ratione et si is, qui in potestate parentis sit, in insulam deportatus fuerit, desinit in potestate parentis esse. Sed si ex indulgentia principali restituti fuerint, per omnia pristinum statum recipiunt.

1. If a man, convicted of some crime, is deported to an island, he loses the rights of a Roman citizen; whence it follows, that the children of a person thus removed from the list of Roman citizens cease to be under his power, exactly as if he was dead. Equally, if a son is deported, does he cease to be under the power of his ascendant. But, if by the favour of the emperor any one is restored, he regains his former position in every respect.

GAI. i. 128.

The *patria potestas* belonging exclusively to citizens, and being necessarily exercised over citizens, when a parent or son lost the rights of citizenship, or, as it was termed, underwent a *media capitis deminutio* (see Tit. 16. 2), the *patria potestas* was necessarily at an end. (ULP. *Reg.* x. 3.) The punishment of *deportatio in insulam* consisted in the condemned being confined within certain local bounds, whether really those of an island, or of some prescribed space of the mainland, and being considered as civilly dead, *deportatus pro mortuo habetur* (D. xxxvii. 4. 10. 8), and looked on as *peregrinus*, not as a *civis*. (ULP. *Reg.* x. 3.) If the condemned was recalled, and by the pardon of the emperor all the effects of his punishment were done away, he was said to be *restitutus in integrum:* he then resumed all his civil rights, and was placed as exactly as possible in the position which he would have held had he never been *deportatus*. (Cod. ix. 51. 1.)

The subject of *capitis deminutio* is resumed in Title 16 in connection with the position of *agnati* with regard to tutorships.

2. Relegati autem patres in insulam in potestate sua liberos re-

2. A father who is merely relegated to an island, still retains his children

tinent; et e contrario liberi relegati in potestate parentum remanent.

in his power; and, conversely, a child who is relegated still remains in the power of his father.

D. xlviii. 22. 4.

The *relegatus* was merely forbidden to leave a certain spot, and his civil *status* was in no way altered. (See OVID, *Trist.* v. 11.)

3. Pœnæ servus effectus filios in potestate habere desinit. Servi autem pœnæ efficiuntur, qui in metallum damnantur et qui bestiis subiciuntur.

3. When a man becomes a 'slave of punishment,' he ceases to have his sons in his power. Persons become 'slaves of punishment' who are condemned to the mines, or exposed to wild beasts.

D. xlviii. 19. 17. 19.

A slave had no legal power over his children; in whatever way, therefore, a father became a slave, he lost his power over his children. When a person was sentenced to work in the mines, or to contend with wild beasts in the arena, punishments only inflicted for very great crimes, he became, by the mere operation of his sentence, a slave. But as there was no master whose slave he could be considered, it was said that he became the slave of the punishment (*servus pœnæ*).

4. Filiusfamilias si militaverit, vel si senator vel consul fuerit factus, manet in patris potestate. Militia enim vel consularia dignitas patris potestate filium non liberat. Sed ex constitutione nostra summa patriciatus dignitas illico ab imperialibus codicillis præstitis a patria potestate liberat. Quis enim patiatur patrem quidem posse per emancipationis modum suæ potestatis nexibus filium relaxare, imperatoriam autem celsitudinem non valere eum, quem sibi patrem elegit, ab aliena eximere potestate?

4. A son, though he becomes a soldier, a senator, or a consul, still remains in the power of his father, from which neither military service nor consular dignity can free him. But by our constitution the supreme dignity of the patriciate frees the son from the power of his father immediately on the grant of the imperial patent. For how can it be tolerated that a father should be able to emancipate his son from the tie of his power, and that the majesty of the emperor should not be able to release from the power of another, one whom he had chosen to be a father of the state?

D. i. 7. 3; C. xii. 3. 5.

Under the old Roman law no child was released from a father's power, by having any dignity or office, except that of a *flamen dialis*, or a vestal virgin. Persons holding either of these offices, without undergoing any *capitis deminutio*, or ceasing to be members of their father's family, became *sui juris*. Justinian conferred the privilege on those enjoying the dignity of the patriciate, and at a later period of his legislation enlarged the number of dignities to which this incident was attached; and the child was freed from the power of his father by being made a bishop, a consul, quæstor of the palace, prætorian præfect, or master of infantry or cavalry; and, in general, all those whose dignity exempted them from the burdens of the *curia* were freed from the power of their father.

(Nov. 31; C. x. 31. 66.) When under Justinian's legislation a child was released by attaining a dignity, he still, as in the older law, remained a member of his father's family, and enjoyed all his rights of succession and agnation. (Nov. 81. 2.)

Constantine changed the meaning of *patricius*, by making it a title of the highest honour conferred on persons who enjoyed the chief place in the emperor's esteem. The power of making *patricii* was, in general, used very sparingly by the emperors, and hence the title became an object of ambition even to foreign princes.

5. Si ab hostibus captus fuerit parens, quamvis servus hostium fiat, tamen pendet jus liberorum propter jus postliminii: quia hi, qui ab hostibus capti sunt, si reversi fuerint, omnia pristina jura recipiunt. Idcirco reversus et liberos habebit in potestate, quia postliminium fingit eum, qui captus est, semper in civitate fuisse: si vero ibi decesserit, exinde, ex quo captus est pater, filius sui juris fuisse videtur. Ipse quoque filius neposve si ab hostibus captus fuerit, similiter dicimus propter jus postliminii jus quoque potestatis parentis in suspenso esse. Dictum est autem postliminium a LIMINE et POST, et eum, qui ab hostibus captus in fines nostros postea pervenit, postliminio reversum recte dicimus. Nam limina sicut in domibus finem quendam faciunt, sic et imperii finem limen esse veteres voluerunt. Hinc et limes dictus est quasi finis quidam et terminus. Ab eo postliminium dictum, quia eodem limine revertebatur, quo amissus erat. Sed et qui victis hostibus recuperatur, postliminio rediisse existimatur.

5. If an ascendant is taken prisoner, although he becomes the slave of the enemy, yet his paternal power is only suspended, owing to the *jus postliminii;* for captives, when they return, are restored to all their former rights. Thus, on his return, the father will have his children in his power: for the *postliminium* supposes that the captive has never been absent. If, however, a prisoner dies in captivity, the son is considered to have been *sui juris* from the time when his father was taken prisoner. So, too, if a son, or grandson, is taken prisoner, the power of the ascendant, by means of the *jus postliminii*, is only in suspense. The term *postliminium* is derived from *post* and *limen.* We therefore say of a person taken by the enemy, and then returning into our territory, that he is come back by *postliminium.* For, just as the threshold forms the boundary of a house, so the ancients have termed the boundary of the empire a threshold. Whence *limes*, also, is derived, and is used to signify a boundary and limit. Thence comes the word *postliminium*, because the prisoner returned to the same limits whence he had been lost. The prisoner, also, who is retaken on the defeat of the enemy, is considered to have come back by *postliminium.*

GAI. i. 129; D. xlix. 15. 29. 3; D. xlix. 15. 26.

By the *jus postliminii*, property taken in war, and retaken from the enemy, was restored to the original owners (see Bk. ii. Tit. 1. 17); and captives, on their return to their own country, were re-established in all their former rights. When the captive returned, all the time of his captivity was, in the eye of the law, blotted out, and he was exactly in the position he would have held if he had not been taken captive. (D. xlix. 15. 21. 6.) The manner of his return was quite immaterial. *Nihil interest quomodo captivus reversus est.* (D. xlix. 15. 26.) When the father

returned, he resumed all his rights over his property, and his *patria potestas* over his children; when a child returned, he regained his rights of succession and agnation, and at the same time he fell again under the *patria potestas* of his father. (D. xlix. 15. 14.) If the captive did not return from captivity, the law considered him to have died at the moment of his captivity commencing, a point important with regard to testaments (see Bk. ii. Tit. 12. 5); and also as making children *sui juris*, and giving them all property acquired by them, from the time of the parent's captivity. Gaius says that in his time this point in favour of the children was not established (Gai. i. 129); but, at any rate, it was so when Ulpian wrote. (D. xlix. 15. 18.)

6. Præterea emancipatione quoque desinunt liberi in potestate parentum esse. Sed ea emancipatio antea quidem vel per antiquam legis observationem procedebat, quæ per imaginarias venditiones et intercedentes manumissiones celebrabatur, vel ex imperiali rescripto. Nostra autem providentia et hoc in melius per constitutionem reformavit, ut, fictione pristina explosa, recta via apud competentes judices vel magistratus parentes intrent et filios suos vel filias vel nepotes vel neptes ac deinceps sua manu dimitterent. Et tunc ex edicto prætoris in hujus filii vel filiæ, nepotis vel neptis bonis, qui vel quæ a parente manumissus vel manumissa fuerit, eadem jura præstantur parenti, quæ tribuuntur patrono in bonis liberti: et præterea si impubes sit filius vel filia vel ceteri, ipse parens ex manumissione tutelam ejus nanciscitur.

6. Children, also, cease to be under the power of their ascendants by emancipation. Formerly emancipation was effected, either by adopting the process of the ancient law, consisting of imaginary sales, each followed by a manumission, or by imperial rescript; but we, in our wisdom, have introduced a reform on this point by one of our constitutions. The old fictitious process is now done away with, and ascendants may now appear directly before a proper judge or magistrate, and free from their power their children, or grandchildren or other descendants. And then, according to the prætorian edict, the ascendant has the same rights over the goods of those whom he emancipates, as the patron has over the goods of his freedman. And further, if the children emancipated, whether sons or daughters or other descendants, are within the age of puberty, the ascendant, by the emancipation, becomes their tutor.

Gai. i. 132, 134; D. xxxvii. 12. 1; D. xxvi. 4. 3. 10; C. viii. 49. 5, 6.

We have no trace of any other form of giving freedom, in early times, than that of emancipation. In the law of the Twelve Tables we find it laid down, '*Si pater filium ter venumduit* (sells), *filius a patre liber esto*'. The father might sell his son, and he would then be in the *mancipium* of the purchaser; but when the purchaser freed him, the son would fall again under his father's power. This might happen over and over again; but the Twelve Tables, whether making a new enactment, or sanctioning an old custom, declared that after a third sale the father's power was extinguished for ever. This may perhaps have been originally intended as a kind of check on the father abusing his power of selling his son, and have been afterwards used as a means of giving freedom by a fictitious sale; or it may have been expressly enacted in the Twelve Tables to extinguish all doubts whether the custom of freeing from a father's power by three sales was valid.

In the form the fictitious sale took in the times of historical certainty, the father three times sold his son to a fictitious purchaser, who, between the first and the second sale, and also between the second and the third, manumitted the son, i.e. discharged him from his power as a master which he had acquired by the sale. After the third sale, the son was in the *mancipium* of the fictitious purchaser, and if this purchaser had manumitted him, he would have been the son's patron. But as the father generally wished to be the patron of his son, the relation giving him, among other things, the right of succeeding to the son if intestate and childless, the purchaser, instead of manumitting him, resold (*remancipavit*) him to the father, who then himself manumitted him, and became his patron. In cases where the fictitious purchaser manumitted the third time, he was considered as a trustee for the father of all the rights of patronage. Originally, an express contract was made, *contracta fiducia*, to bind the purchaser to remancipate or to manumit, reserving the rights of patronage to the father, as the case might be; but in later times the purchaser was considered bound by an implied contract, and the prætorian edict, as we learn from the text, secured to the father in all cases the rights of patronage.

As the law of the Twelve Tables spoke only of a son, it was considered by a strict interpretation of the term, 'son,' that one sale instead of three was sufficient in the case of a daughter or grandchild. (GAI. i. 134, 135*b*.)

Anastasius (A.D. 503) introduced a new mode of freeing the child from the power of the father. The emperor issued, in cases where he thought it proper, a rescript authorising the emancipation; and this rescript being registered by a magistrate, the consent of the child, if of age, being declared, and the final permission of the emperor being given, the process was complete. (C. viii. 49. 5.)

Justinian, in giving the greatest possible facility to emancipation, preserved all the effects which the process had had under the old system of fictitious sales. Both under his system and that of Anastasius, a child could be emancipated in his absence, which was not possible in the times when the old forms of manumission were strictly observed.

7. Admonendi autem sumus, liberum esse arbitrium ei, qui filium et ex eo nepotem vel neptem in potestate habebit, filium quidem de potestate dimittere, nepotem vero vel neptem retinere: et ex diverso filium quidem in potestate retinere, nepotem vero vel neptem manumittere (eadem et de pronepote vel pronepte dicta esse intellegantur) vel omnes sui juris efficere.

7. It is also to be observed, that a person having in his power a son, and by that son a grandson or granddaughter, may emancipate his son, and retain in his power his grandson or granddaughter; or, conversely, he may emancipate his grandson or granddaughter, and retain his son in his power; and the same may be understood as said of a great-grandson, or a great-granddaughter: or he may make them all *sui juris*.

AI. i. 133.

8. Sed et si pater filium, quem in potestate habet, avo vel proavo naturali secundum nostras constitutiones super his habitas in adoptionem dederit, id est si hoc ipsum, actis intervenientibus, apud competentem judicem manifestavit, præsente eo, qui adoptatur, et non contradicente nec non eo, qui adoptat, solvitur quidem jus potestatis patris naturalis, transit autem in hujusmodi parentem adoptivum, in cujus persona adoptionem plenissimam esse antea diximus.

8. If a father has a son in his power, and gives him in adoption to the son's natural grandfather or great-grandfather, in conformity with our constitutions enacted on this subject, that is, if he declares his intention in a formal act before a competent judge, in the presence and without the dissent of the person adopted, and also in the presence of the person who adopts, then the right of paternal power is extinguished as to the natural father, and passes from him to the adoptive father; with regard to whom, as we have before observed, adoption preserves all its effects.

C. viii. 47. 11.

The adoptive father could not acquire any *patria potestas* by fictitious sales; he could only extinguish that of the natural father. In order to gain it himself, he had recourse to another fictitious process, called *in jure cessio*. He claimed the child as his before a magistrate, and the natural father not withstanding the claim, the child was given into the *patria potestas* of the adoptive father. For the change made by Justinian in the law of adoption, see Tit. 11. 1, 2.

9. Illud autem scire oportet, quod, si nurus tua ex filio tuo conceperit et filium postea emancipaveris vel in adoptionem dederis prægnante nuru tua, nihilo minus quod ex ea nascitur, in potestate tua nascitur: quod si post emancipationem vel adoptionem fuerit conceptum, patris sui emancipati vel avi adoptivi potestati subicitur: et quod neque naturales liberi neque adoptivi ullo pæne modo possunt cogere parentem de potestate sua eos dimittere.

9. It must be observed, that, if your daughter-in-law conceives by your son, and if during her pregnancy you emancipate your son, or give him in adoption, the child will be born in your power; but if the child is conceived subsequently to the emancipation or adoption, he is born in the power of his emancipated father, or his adoptive grandfather. Children, natural or adoptive, have no means, or almost none, of compelling their parents to free them from their power.

GAI. i. 135, 137; D. i. 7. 31, 33.

The rights of a child were always determined by reference to the moment of conception, not of birth, when he was born *in justo matrimonio*, because he then followed the condition of his father. But when he followed the condition of his mother, as he did when he was born out of *justum matrimonium*, reference was had to the time of his birth (GAI. i. 89), or, in the later law, to the time of his conception, of his birth, or to any intermediate time, as might be most favourable to him. (See Tit. 4. pr.)

The exceptional cases alluded to in the words *neque ullo pœne modo* only occurred where the father attempted to make a base use of his power over his children, or abandoned them (C. xi. 40. 6; viii. 52. 2); or when a person, arrogated under the age of puberty, on attaining that age, compelled his adoptive father to emancipate him. (D. i. 7. 33.)

TIT. XIII. DE TUTELIS.

Transeamus nunc ad aliam divisionem. Nam ex his personis, quæ in potestate non sunt, quædam vel in tutela sunt, vel in curatione, quædam neutro jure tenentur. Videamus igitur de his, quæ in tutela vel in curatione sunt: ita enim intellegemus ceteras personas, quæ neutro jure tenentur. Ac prius dispiciamus de his, quæ in tutela sunt.

Let us now proceed to another division. Of those who are not in the power of an ascendant, some are under a tutor, some under a curator, some under neither. Let us treat, then, of those persons who are under a tutor or curator; for we shall thus ascertain who are they who are not subject to either. And first of persons under a tutor.

GAI. i. 142, 143.

This is rather a subdivision of persons *sui juris* than another division of persons generally. There were some persons who were exempt from the *patria potestas*, and yet required constant protection and assistance. When this arose from youth, or, in the old law of Rome, from the incapacity supposed always to attach to females (*propter animi levitatem*, GAI. i. 144), the protector was called a *tutor;* when it arose from mental incapacity, he was called a *curator*. The two offices greatly resembled each other; but there was one leading distinction between them. The *tutor* was said to be given to the person (Tit. 15. 4); he not only administered the property of the pupil, but he also supplied what was wanting to complete the pupil's legal character. The *curator* was said to be given to the property: his duty was exclusively to see that the person under his care did not waste his goods. (See Introd. sec. 43.)

1. Est autem tutela, ut Servius definivit, jus ac potestas in capite libero ad tuendum eum, qui propter ætatem se defendere nequit, jure civili data ac permissa.

1. Tutelage, as Servius has defined it, is an authority and power over a free person, given and permitted by the civil law, in order to protect one whose tender years prevent him defending himself.

D. xxvi. 1. 1.

By a free person is meant here one *sui juris*. The power of a tutor (*potestas*) was either given (*data*) by the civil law, when it devolved on the next of kin, or allowed (*permissa*) by that law, when it was conferred by testament.

2. Tutores autem sunt, qui eam vim ac potestatem habent, exque re ipsa nomen ceperunt. Itaque appellantur tutores quasi tuitores atque defensores, sicut æditui dicuntur, qui ædes tuentur.

2. Tutors are those who have this authority and power, and they take their name from the nature of their office; for they are called tutors, as being protectors (*tuitores*) and defenders; just as those who have the care of the sacred edifices are called *æditui*.

3. Permissum est itaque parentibus, liberis impuberibus, quos in potestate habent, testamento tutores dare. Et hoc in filio filiaque omnimodo procedit; nepotibus tamen neptibusque ita demum parentes possunt testamento tutores dare, si post mortem eorum in patris sui potestatem non sint recasuri. Itaque si filius tuus mortis tuæ tempore in potestate tua sit, nepotes ex eo non poterunt testamento tuo tutorem habere, quamvis in potestate tua fuerint; scilicet quia mortuo te in patris sui potestatem recasuri sunt.

3. Ascendants may give tutors by testament to such of their children as have not attained the age of puberty, and are under their power. And this without any distinction in the case of all sons and daughters. But grandfathers can only give tutors to their grandchildren when these will not fall under the power of their father on the death of the grandfather. Hence, if your son is in your power at the time of your death, your grandchildren by that son cannot have a tutor appointed them by your testament, although they were in your power; because, at your decease, they will fall under the power of their father.

GAI. i. 144, 146.

The law of the Twelve Tables said, '*Uti legassit super pecunia tutelave suæ rei, ita jus esto*'. None but the head of the family could appoint a tutor by testament, and for none but children, or descendants in his power, who were included in the term *sua res*. Further, he could only appoint a tutor for those who, on his death, became *sui juris*, and were under age.

4. Cum autem in compluribus aliis causis postumi pro jam natis habentur, et in hac causa placuit non minus postumis quam jam natis testamento tutores dari posse, si modo in ea causa sint, ut, si vivis parentibus nascerentur, sui et in potestate eorum fierent.

4. Posthumous children, as in many other respects, so also in this respect, are considered as already born before the death of their fathers; and tutors may be given by testament to posthumous children, as well as to children already born, provided that the posthumous children, had they been born in the lifetime of their ascendant, would have been *sui heredes*, and in their ascendant's power.

GAI. i. 147.

It was a maxim of Roman law that nothing could be given by testament to an uncertain person, and a posthumous child was looked on in this light, so much so that he could not be heir, nor take a legacy, nor have a tutor appointed by will; afterwards this was so far modified that as regarded the chief of his family he was looked on as if born in the father's lifetime (*pro jam nato habebatur*); that is, the ascendant might make him heir, disinherit him, give him a legacy, or appoint a tutor for him.

It was not until the time of Justinian that the posthumous child of a stranger was capable of taking under a testament. (See note on Bk. ii. Tit. 13. 1.) The words *in compluribus causis* are extracted from Gaius; Justinian left no point of difference between the posthumous child and the child born in its father's lifetime. (C. vi. 48.) The proper meaning of *posthumus* is 'born after the death of a person'. Under special legislation it received the artificial sense of 'born after the date of a testament'. (Bk. ii. Tit. 13. 2.)

By the term *sui heredes* were meant those persons who, on the death of the head of the family, having no one above them in the line of ascent, became *sui juris*, and were the necessary heirs of the deceased, if intestate. (See Introd. sec. 77.)

5. Sed si emancipato filio tutor a patre testamento datus fuerit, confirmandus est ex sententia præsidis omnimodo, id est sine inquisitione.

5. But, if a father gives a tutor by testament to his emancipated son, the appointment must be confirmed by the sentence of the *præses* in all cases, that is, without inquiry.

D. xxvi. 3. 1.

The emancipated child, not being in the power of his father, could not, strictly speaking, be subject to the father's directions as to his tutor; but a magistrate had power to carry out an appointment of a tutor in a testament if there was only this technical objection to be surmounted. The wishes of a father were considered so sure an indication to the magistrate of the fittest person to be tutor, that they were always carried out without examining into the suitability of the appointment (*sine inquisitione*), unless some change in the position of the tutor since the making of the testament made him obviously unfit for the office. (D. xxvi. 8. 9.)

A father could appoint by testament a tutor for his illegitimate children if he left them property; and the mother, the patron, and indeed a stranger who instituted as heir an infant *sui juris*, might appoint a tutor by testament, and the magistrate carried out the appointment, but in these cases not until he had examined all the circumstances of the case. (D. xxvi. 2. 4. and 3. 4.) The husband might also by testament appoint a tutor to his wife *in manu*, or give her the option of fixing on a tutor. (Gai. i. 148-154.)

Tit. XIV. QUI DARI TUTORES TESTAMENTO POSSUNT.

Dari autem potest tutor non solum paterfamilias, sed etiam filiusfamilias.

Not only a *paterfamilias* may be appointed tutor, but also a *filiusfamilias*.

The office of tutor was looked on as in some respects a public one, as the tutor supplied what was wanting to the *persona* of a citizen; and a *filiusfamilias* was always capable of holding any public office. (D. i. 6. 9.)

Any one could be made a tutor by testament with whom there was the *testamenti factio* (D. xxvi. 2. 21), or, in other words, any one who had the rights of citizenship sufficiently to enable him to go through the peculiar forms of Roman law.

Women could not be appointed tutors according to the old law, but the emperors would confirm the power of a mother named by testament tutor of her children. (D. xxvi. 1. 18.)

1. Sed et servus proprius testamento cum libertate recte tutor dari potest. Sed sciendum est, eum et sine libertate tutorem datum tacite et libertatem directam accepisse videri et per hoc recte tutorem esse. Plane si per errorem quasi liber tutor datus sit, aliud dicendum est. Servus autem alienus pure inutiliter datur testamento tutor: sed ita cum liber erit utiliter datur. Proprius autem servus inutiliter eo modo datur tutor.

1. A man may also by testament appoint as a tutor his own slave, at the same time giving him his liberty. But it must be observed that if a slave is appointed tutor without an express gift of liberty, he is still held to receive by implication a direct freedom, and thus can legally be tutor. If, however, it is by mistake, and from the testator supposing him to be free, that he is appointed tutor, the decision would be different. The appointment of a slave belonging to another person as tutor is ineffectual, if unconditional; but is valid when made with this condition, 'when he shall be free'. If, however, any one appoints his own slave with such a condition, the appointment is void.

D. xxvi. 2. 32. 2.

A slave was incapable of holding any legal office. It was therefore necessary to enfranchise him in order that he might become a tutor. If the appointment was made without express enfranchisement, it was the opinion of Paul (D. xxvi. 2. 32) that the appointment implied enfranchisement, and this as if given by the testator himself (*directa*), and not entrusted to his heir to give (*fideicommissaria*). Valerian and Gallian, however, decided subsequently by a rescript (C. vii. 4. 9), that it was only a *libertas fideicommissaria* which such an appointment carried with it. Justinian here restores the authority of the former opinion.

The appointment of the slave of another carried with it the *libertas fideicommissaria*, that is, it was incumbent on the heir to purchase and emancipate the slave, who could then discharge the office of tutor. (D. xxvi. 2. 10. 4.) If the heir was not able to purchase the slave, then the slave could not act as tutor until he gained his freedom in some other way. Even if the testator had not used the words *cum liber erit*, or some corresponding expression, he was presumed to have intended to use them, unless a contrary intention appeared. (D. xxvi. 2. 10. 4; Cod. vii. 4. 9.) If a testator said of his own slave that he was to be tutor when free, this showed that the testator, who had the power to enfranchise him, did not choose to exercise it; and as he thus voluntarily made his own appointment void, the law would not help him.

2. Furiosus vel minor viginti quinque annis tutor testamento datus tutor erit, cum compos mentis aut major viginti quinque annis fuerit factus.

2. If a madman or a person under the age of twenty-five years is by testament appointed tutor, the one is to begin to act when he becomes of sound mind, and the other when he has completed his twenty-fifth year.

D. xxvi. 1. 11; xxvi. 2. 32. 2.

Meanwhile the magistrate would appoint another tutor. (See Tit. 20.)

3. Ad certum tempus vel ex certo tempore vel sub condicione vel ante heredis institutionem posse dari tutorem non dubitatur.

3. There is no doubt that a tutor may be appointed either until a certain time, or from a certain time, or conditionally, or before the institution of an heir.

The old law regarded the naming of the persons designed to take as heirs under the testament, as the base of the testament, and passed over every declaration of the testator's wishes placed before this as out of due order and entirely void. The Proculians (GAI. ii. 231) thought this ought not to be extended to the appointment of a tutor, and Justinian did away with the doctrine altogether. (See note on Bk. ii. Tit. 14. pr.)

4. Certæ autem rei vel causæ tutor dari non potest, quia personæ, non causæ vel rei datur.

4. A tutor cannot be appointed for a particular thing or business, as it is to a person, and not for a business or a thing, that a tutor is appointed.

D. xxvi. 2. 12. 14.

The tutor had to take charge of the whole interests of the pupil, and complete his *persona*, and therefore to appoint him to take charge of his interest in any one matter only was inconsistent with the nature of his office, and such an appointment was void. (D. xxvi. 2. 13.) If, however, the property of the pupil was situated in provinces far apart from each other, a separate tutor might be appointed to take care of his interests in each province. (D. xxvi. 2. 15.)

5. Si quis filiabus suis vel filiis tutores dederit, etiam postumæ vel postumo videtur dedisse, quia filii vel filiæ appellatione et postumus et postuma continentur. Quid, si nepotes sint, an appellatione filiorum et ipsis tutores dati sunt? Dicendum est, ut ipsis quoque dati videantur, si modo liberos dixit. Ceterum si filios, non continebuntur: aliter enim filii, aliter nepotes appellantur. Plane si postumis dederit, tam filii postumi quam ceteri liberi continebuntur.

5. If any one appoints a tutor to his sons or daughters, he is held also to appoint him as tutor to his posthumous children; because, under the appellation of son or daughter, a posthumous son or daughter is included. But if there are grandchildren, are they included in the appointment of a tutor to sons? We answer that under an appointment to children, grandchildren are included, but not under an appointment to sons; for son and grandson are quite distinct words. But, if a testator appoints a tutor to those who are posthumous, the term obviously includes all posthumous children, whether sons or grandsons.

TIT. XV. DE LEGITIMA ADGNATORUM TUTELA.

Quibus autem testamento tutor datus non sit, his ex lege duodecim tabularum adgnati sunt tutores, qui vocantur legitimi.

They to whom no tutor has been appointed by testament, have their *agnati* as tutors, by the law of the Twelve Tables, and such tutors are called 'legal tutors'.

GAI. i. 155; D. xxvi. 4. 1.

Tutores legitimi mean tutors appointed by a law, that is, by the law of the Twelve Tables, or according to some inference from its provisions, as in the case of patrons. (See Tit. 17.) 'Legal' must be here understood as equivalent to 'by virtue of a law'.

1. Sunt autem adgnati per virilis sexus cognationem conjuncti, quasi a patre cognati, veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patrui filius neposve ex eo. At qui per feminini sexus personas cognatione junguntur, non sunt adgnati, sed alias naturali jure cognati. Itaque amitæ tuæ filius non est tibi adgnatus, sed cognatus (et invicem scilicet tu illi eodem jure conjungeris), quia qui nascuntur, patris, non matris familiam sequuntur.

1. *Agnati* are those who are related to each other through males, that is are related through the father, as, for instance, a brother by the same father, or the son of such a brother, or the son of such a son, or, again, a father's brother, or a father's brother's son, or the son of such a son. But those who are related to us through females are not *agnati*, but merely *cognati* by natural relationship. Thus the son of a father's sister is related to you not by agnation, but by cognation, and you are also related to him by cognation; as children belong to the family of their father, and not to that of their mother.

GAI. i. 156.

The law gave the rights of relationship, such as inheritance and appointment as tutors, to the *agnati* only. All persons, related by ties of blood, were *cognati* to each other. Within this larger circle the members of any one family were *agnati* to each other. (See Introd. sec. 44, 45.) A family, in this sense, consisted of all persons related to each other, by having a common ancestor, in whose power, if he was alive, they would all be. A brother and sister, for instance, were *agnati*, and a nephew and aunt, by the father's side. For if the grandfather were alive all would be in his power. But the tie was dissolved by the sister or aunt marrying *in manum* (see Introd. sec. 46); and as the children of females would be in the power of the husband, they could never be *agnati* to their mother's *agnati*, except by adoption; and hence it is here said that *agnati* are related through males only. By the 118th Novel Justinian abolished this distinction between *agnati* and *cognati*, and the nearest in blood was thenceforth the *tutor legitimus*. (Nov. 118. 4, 5.)

2. Quod autem lex ab intestato vocat ad tutelam adgnatos, non hanc habet significationem, si omnino non fecerit testamentum is, qui poterat tutores dare, sed si quantum ad tutelam pertinet, intestatus decesserit. Quod tunc quoque accidere intellegitur, cum is, qui datus est tutor, vivo testatore decesserit.

2. The law calling the *agnati* to be tutors in case of intestacy does not refer merely to the case of a person who might have appointed a tutor, dying without having made any testament at all, but also to that of a person dying intestate only so far as regards the appointment of a tutor, and this includes the case of a tutor nominated by testament dying in the lifetime of the testator.

D. xxvi. 4. 6.

It was necessary to state expressly that the testament was good as far as it went, and that the law remedied its deficiency by making the *agnati* tutors, because it was a maxim of Roman law that a man could not die partly testate and partly intestate. (See note on Bk. ii. Tit. 14. 9.)

3. Sed adgnationis quidem jus omnibus modis capitis deminutione plerumque perimitur: nam adgnatio juris est nomen. Cognationis vero jus non omnibus modis commutatur, quia civilis ratio civilia quidem jura corrumpere potest, naturalia vero non utique.

3. The right of agnation is ordinarily taken away universally by *capitis deminutio*, for agnation is a term of civil law; but the right of cognation is not lost in every case by *capitis deminutio*, for although civil law may destroy civil rights, it cannot destroy natural rights.

GAI. i. 158.

The tie of agnation being created by law, could also be dissolved by it: not so that of cognation, which was a tie of nature. But the law could take away the legal rights attaching to the natural tie; and this it did in the case of the *maxima* and of the *media capitis deminutio*. (See next Title, 6.)

A constitution of Theodosius and Arcadius provided that the mother, if she has not remarried, and undertakes not to remarry, may have the *tutela* of her children given her. (C. v. 35. 2.) And Justinian, by the 118th Novel, extended this to the grandmother, as well as the mother, if there was no testamentary tutor.

TIT. XVI. DE CAPITIS MINUTIONE.

Est autem capitis deminutio prioris status commutatio, eaque tribus modis accidit; nam aut maxima est capitis deminutio aut minor, quam quidam mediam vocant, aut minima.

Capitis deminutio is a change of *status*, which may happen in three ways: for it may be the greatest *capitis deminutio*, or the less, also called the middle, or the least.

GAI. i. 159.

The *status* of a Roman citizen was composed of three elements: *Tria sunt quæ habemus: libertatem, civitatem, familiam.* (D. iv. 5. 11.) The citizen was free, he had his position as a *civis*, he had his position in a family. *Caput*, originally signifying the mention made of the citizen in the registers of the census, meant the sum of the legal capacities of a *persona*, the possession of which gave him his *status;* and if a citizen changed his *status*, that is, if he lost his liberty or his civic rights, or changed his family position by adoption or emancipation, he underwent what was termed a *capitis deminutio*, this *capitis deminutio* being termed *maxima*, *media*, or *minima*, according to which of the three elements of *status* it was that was primarily affected.

1. Maxima est capitis deminutio, cum aliquis simul et civitatem et libertatem amittit. Quod accidit in his, qui servi pœnæ efficiuntur atrocitate sententiæ, vel liberti ut in-

1. The greatest *capitis deminutio* is, when a man loses both his citizenship and his liberty; as they do who by a terrible sentence are made 'the slaves of punishment'; or freedmen, con-

grati circa patronos condemnati, vel qui ad pretium participandum se venumdari passi sunt.

demned for ingratitude towards their patrons; or those who suffer themselves to be sold in order to share the price obtained.

GAI. i. 160; D. xxviii. 3. 6. 6; xxv. 3. 7. 1.

See Tit. 12. 3; Tit. 3. 4 note.

2. Minor sive media est capitis deminutio, cum civitas quidem amittitur, libertas vero retinetur. Quod accidit ei, cui aqua et igni interdictum fuerit, vel ei, qui in insulam deportatus est.

2. The less or middle *capitis deminutio* is, when a man loses his citizenship, but retains his liberty; as is the case when any one is forbidden the use of fire and water, or is deported to an island.

GAI. i. 161.

In this kind of *capitis deminutio*, as well as in the preceding, the position in the *familia* was lost, its rights belonging only to citizens. In this lesser kind, freedom is preserved; but the person who undergoes the change of *status* becomes a stranger, *peregrinus fit.* (ULP. *Reg.* 10. 3.) It was a maxim of Roman law, that no one could cease to be a citizen against his will. *Civitatem nemo unquam ullo populi jussu amittit invitus.* (CIC. *pro Dom.* 29.) The condemned was therefore denied the necessaries of life, until he was driven to withdraw himself from the city. *Id autem ut esset faciendum, non ademptione civitatis, sed tecti, et aquæ et ignis interdictione faciebant.* (CIC. *pro Dom.* 30.) The *aquæ et ignis interdictio* thus became a form by which a sentence of perpetual banishment was inflicted. The *deportatio in insulam* superseded this form. (D. xlviii. 29. 2.) The person who was banished was confined to certain limits, out of which he could not stir without rendering himself punishable with death. This must be kept distinct from simple *relegatio,* which was also an exile within prescribed limits, but did not in any way affect the *status.* (D. xlviii. 22. 7. See Tit. 12. 1 and 2.)

3. Minima capitis deminutio est, cum et civitas et libertas retinetur, sed status hominis commutatur. Quod accidit in his, qui, cum sui juris fuerunt, cœperunt alieno juri subjecti esse, vel contra.

3. The least *capitis deminutio* is, when a person's *status* is changed without forfeiture either of citizenship or liberty; as when a person *sui juris* becomes subject to the power of another, or a person *alieni juris* becomes *sui juris.*

GAI. i. 162.

The *status* was changed (*commutatur*) by the change of family position; but the person who underwent this form of *capitis deminutio* had still after it all the three elements of *status.* Whether the *minima capitis deminutio* involved a degradation or merely a change has been much debated by commentators. Savigny (see Poste's *Gaius*, p. 128) was of opinion that *capitis deminutio* always involved a degradation. The French commentators take the other view, that there was merely a change implied, and they

have, perhaps, if not the better arguments, the clearer authorities on their side. Thus Ulpian says the *minima capitis deminutio* takes place *salvo statu*. (D. xxxviii. 17. 1. 8.) What is said in the Digest of change of family by arrogation and emancipation must be extended to adoption. (D. iv. 5. 3.) In old times, the wife who passed *in manum viri*, or the freeman who was given *in mancipio*, underwent this *minima capitis deminutio*. (GAI. i. 162.)

After the words *vel contra*, at the end of this paragraph, some texts have the following words: *veluti si filiusfamilias a patre emancipatus fuerit, est capite deminutus*. The addition is probably owing to some writer having perceived that it was only in the case of emancipation that it was true that when a person became *sui juris* he was *capite minutus*. There was no change of family when a son became *sui juris* on the death of his father.

The person who underwent the *minima capitis deminutio* was, in the eyes of the law, a new person. He could not, therefore, until the prætor permitted an action against him, be sued for debts previously contracted. (D. iv. 5. 2.) And we shall see, in the Second Book, that in the old law a usufruct was extinguished by the *minima capitis deminutio* of the usufructuary. (Bk. ii. Tit. 4. 3.) The *capite minutus* also, as we shall see in the Third Book (Tit. 1. 9 and 10. 1), forfeited his place in intestate succession, except so far as he was helped by the prætor, or by legislation.

4. Servus autem manumissus capite non minuitur, quia nullum caput habuit.

4. A slave who is manumitted is not said to be *capite minutus*, as he has no '*caput*'.

D. iv. 5. 3. 2.

5. Quibus autem dignitas magis quam status permutatur, capite non minuuntur: et ideo senatu motos capite non minui constat.

5. Those whose dignity rather than their *status* is changed, do not undergo a *capitis deminutio*, and so persons removed from the senatorial dignity undergo none.

D. i. 9. 3.

Even *infamia*, during the Empire at any rate, did not produce a *capitis deminutio*. (D. l. 16. 103.)

6. Quod autem dictum est, manere cognationis jus et post capitis deminutionem, hoc ita est, si minima capitis deminutio interveniat: manet enim cognatio. Nam si maxima capitis deminutio incurrat, jus quoque cognationis perit, ut puta servitute alicujus cognati, et ne quidem, si manumissus fuerit, recipit cognationem. Sed et si in insulam deportatus quis sit, cognatio solvitur.

6. In saying that the right of cognation remains in spite of a *capitis deminutio*, we were speaking only of the least *deminutio*, after which the cognation subsists. For, by the greater *deminutio*, as, for example, if one of the *cognati* becomes a slave, the right of cognation is wholly destroyed, so as not to be recovered even by manumission. So, too, the right of cognation is put an end to by deportation to an island.

D. xxxviii. 8. 5. 7.

See Tit. 15. 1. A change of the civil family by adoption or arrogation never dissolved the natural tie of *cognatio*, or destroyed its attendant civil rights; but these were destroyed by a sentence which involved the loss of the *civitas*. And if the *civitas* was once lost and then regained, the restored, or rather new, *civis* was in all respects the founder of a new family, excepting when he was *restitutus in integrum*, that is, restored by the emperor to the same position that he had formerly held. (See Tit. 12. 1.)

7. Cum autem ad adgnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum, qui proximiore gradu sint, vel, si ejusdem gradus sint, ad omnes.

7. The right to be tutor, which belongs to the *agnati*, does not belong to all at the same time, but to the nearest in degree only; or if there are many in the same degree, then to all in that degree.

GAI. i. 164.

The principle of the law was, that those persons should have the burden of the tutelage who had the hope of the succession. (Tit. 17. pr.) The nearest in degree of the *agnati* were therefore the tutors in case of intestacy. The nearest in degree might, however, happen to be a woman or an infant, and then, although this person was the next in succession to the inheritance, it was necessary to go a step further off to find the tutor. (D. xxvi. 4. 1. 1.)

TIT. XVII. DE LEGITIMA PATRONORUM TUTELA.

Ex eadem lege duodecim tabularum libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quæ et ipsa legitima tutela vocatur: non quia nominatim ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. Eo enim ipso, quod hereditates libertorum libertarumque, si intestati decessissent, jusserat lex ad patronos liberosve eorum pertinere, crediderunt veteres, voluisse legem etiam tutelas ad eos pertinere, cum et adgnatos, quos ad hereditatem vocat, eosdem et tutores esse jussit et quia plerumque, ubi successionis est emolumentum, ibi et tutelæ onus esse debet. Ideo autem diximus plerumque, quia, si a femina impubes manumittatur, ipsa ad hereditatem vocatur, cum alius est tutor.

By the same law of the Twelve Tables, the tutelage of freedmen and freedwomen belongs to their patrons, and to the children of their patrons; and this tutelage, too, is called legal tutelage: not that the law contains any express provision on the subject, but because it has been as firmly established by interpretation, as if it had been introduced by the express words of the law. For as the law had ordered that patrons and their children should succeed to the inheritance of their freedmen or freedwomen who should die intestate, the ancients were of opinion that the intent of the law was that the tutelage also belonged to them; seeing that the law, which calls *agnati* to the inheritance, also appoints them to be tutors, because in most cases, where the advantage of the succession is, there also ought to be the burden of the tutelage. We say 'in most cases,' because, if a person below the age of puberty is manumitted by a female, she is called to the inheritance, while another person is tutor.

GAI. i. 165; D. xxvi. 4. 1. 1. 3.

The law gave the patron the right of succession to the inheritance of the freedman; and as the right of succession was connected with the tutelage in the case of the *agnati*, it seemed natural to connect the two in the case of the patron.

TIT. XVIII. DE LEGITIMA PARENTUM TUTELA.

Exemplo patronorum recepta est et alia tutela, quæ et ipsa legitima vocatur. Nam si quis filium aut filiam, nepotem aut neptem ex filio et deinceps impuberes emancipaverit, legitimus eorum tutor erit.

In imitation of the tutelage of patrons, there is, too, another kind which also is said to be legal: for if any one emancipates, below the age of puberty, a son, or a daughter, or a grandson, or a granddaughter, being the issue of a son, or any other descendant, he is their legal tutor.

GAI. i. 175.

This has already been stated in Title 12. 6. (See note to that paragraph.)

TIT. XIX. DE FIDUCIARIA TUTELA.

Est et alia tutela, quæ fiduciaria appellatur. Nam si parens filium vel filiam, nepotem vel neptem et deinceps impuberes manumiserit, legitimam nanciscitur eorum tutelam: quo defuncto, si liberi virilis sexus extant, fiduciarii tutores filiorum suorum vel fratris vel sororis et ceterorum efficiuntur. Atqui patrono legitimo tutore mortuo, liberi quoque ejus legitimi sunt tutores: quoniam filius quidem defuncti, si non esset a vivo patre emancipatus, post obitum ejus sui juris efficeretur nec in fratrum potestatem recideret ideoque nec in tutelam, libertus autem si servus mansisset, utique eodem jure apud liberos domini post mortem ejus futurus esset. Ita tamen ii ad tutelam vocantur, si perfectæ ætatis sint. Quod nostra constitutio generaliter in omnibus tutelis et curationibus observari præcepit.

There is another kind of tutelage called fiduciary; for if an ascendant emancipates, below the age of puberty, a son or a daughter, a grandson or a granddaughter, or any other descendant, he is their legal tutor; but if, at his death, he leaves male children, they become the fiduciary tutors of their own sons, or brother, or sister, or other descendants of the deceased. But when a patron, who is a legal tutor, dies, his children also become legal tutors; the reason of this distinction being that a son, who has not been emancipated in his father's lifetime, becomes *sui juris* at the death of his father, and does not fall under power of his brothers, nor, therefore, under their tutelage; while the freedman, had he remained a slave, would also have been, after the death of his master, the slave of his master's children. These persons, however, are not called to be tutors unless of full age, a rule which by our constitution applies generally to all tutors and curators.

D. xxvi. 4. 3, 4; C. v. 30. 5.

When it is said that the sons become the fiduciary tutors of their own sons, reference is made to the case of the grandsons having been emancipated by the grandfather.

The person who emancipated the child succeeded to all the

rights of a patron over the child; if, as was usual (see Tit. 12. 6, note), it was the father, then, as being the patron, he was included in the terms of the law of the Twelve Tables, and was a *tutor legitimus* (GAI. i. 172; D. xxvi. 4. 3-10); if it was not, he was a *tutor fiduciarius* (GAI. i. 166), a tutor bound to the father by a trust. In the case of a slave, the children of a patron succeeded to the rights of patronage; but this did not extend to the case of emancipated children: the children not emancipated were not the patrons of those who were. They were not tutors, therefore, by the law of the Twelve Tables, and the word *fiduciarii* is borrowed from its more proper usage to express their position, and is in this case merely opposed to *legitimi*. (D. xxvi. 4. 4.) The reason given in the text for their being only *tutores fiduciarii*, viz. that the emancipated infant would have been *sui juris* if he had not been emancipated, is manifestly an imperfect one. For it would not be necessarily true when a grandfather emancipated his grandson; supposing his father were living and in the power of the grandfather, the grandson would not on the grandfather's death become *sui juris*, if he were not emancipated. If the father of the emancipated child left no other children above the age of puberty, the nearest *agnatus*, as, for instance, the father's brother, was the *tutor*, and he, too, was called the *tutor fiduciarius*. (THEOPH. *Paraph.*)

The *perfecta ætas* was the age of twenty-five years.

TIT. XX. DE ATILIANO TUTORE VEL EO, QUI EX LEGE JULIA ET TITIA DABATUR.

Si cui nullus omnino tutor fuerat, ei dabatur in urbe quidem Roma a prætore urbano et majore parte tribunorum plebis tutor ex lege Atilia, in provinciis vero a præsidibus provinciarum ex lege Julia et Titia.

If any one had no tutor at all, one used to be given him, in the city of Rome by the *prætor urbanus*, and a majority of the tribunes of the plebs, under the *lex Atilia*; in the provinces by the *præsides* under the *lex Julia et Titia*.

GAI. i. 185.

The date of the *lex Atilia* is unknown, but it must have been in existence in the year B.C. 197, when Livy (xxxix. 9) says of a *liberta*, '*Post patroni mortem, quia in nullius manu erat, tutore a tribunis et prætore petito*'. And as the necessity for some means of appointing a tutor, where one was not appointed by testament or law, must have been early felt, the *lex Atilia*, or one similar to it, must probably have existed long before the time of which Livy speaks. The date of the *lex Julia et Titia* was probably B.C. 31. As there were ten tribunes, the majority would be at least six.

The term *tutor dativus* is used by Justinian (Cod. i. 3. 52) to express a tutor given by the magistrate; this term being used by Gaius (i. 154) to express tutors given by testament.

1. Sed et si testamento tutor sub condicione aut die certo datus fuerat,

1. Again, if a testamentary tutor had been appointed conditionally, or

quamdiu condicio aut dies pendebat, ex iisdem legibus tutor dari poterat. Item si pure datus fuerat, quamdiu nemo ex testamento heres existebat, tamdiu ex iisdem legibus tutor petendus erat, qui desinebat tutor esse, si condicio existeret aut dies veniret aut heres existeret.

from a certain time, then until the completion of the condition or arrival of the time fixed, another tutor might be appointed under the same laws. Also, if a tutor had been given unconditionally, yet, as long as no one had accepted the inheritance, as heir by the testament, another tutor might under the same laws be appointed for the interval. But his office ceased when the condition was accomplished, when the time arrived, or the inheritance was entered upon.

GAI. i. 186; D. xxvi. 2. 11.

If the wishes of the testator were declared to any extent respecting the appointment of a tutor, this entirely excluded the *tutores legitimi*, and every deficiency in the declaration was remedied by the interposition of the magistrate. (D. xxvi. 2. 11.)

No testament took effect until an heir entered on the inheritance. (See Introd. sec. 76.) If it was known that a testament existed appointing a tutor, this excluded the *agnati* from being tutors; but the tutor under the testament did not commence his *tutela* until the testament took effect. Meantime a tutor appointed by the magistrate took care of the pupil.

2. Ab hostibus quoque tutore capto, ex his legibus tutor petebatur, qui desinebat esse tutor, si is, qui captus erat, in civitatem reversus fuerat: nam reversus recipiebat tutelam jure postliminii.

2. If, again, a tutor was taken prisoner by the enemy, application could be made, under the same laws, for another tutor, whose office ceased when the first tutor returned from captivity; for on his return he resumed the tutelage by the *jus postliminii.*

GAI. i. 187.

For an account of the *jus postliminii*, see Title 12. 5.

3. Sed ex his legibus pupillis tutores desierunt dari, posteaquam primo consules pupillis utriusque sexus tutores ex inquisitione dare cœperunt, deinde prætores ex constitutionibus. Nam supra scriptis legibus neque de cautione a tutoribus exigenda rem salvam pupillis fore, neque de compellendis tutoribus ad tutelæ administrationem quidquam cavetur.

3. But tutors have ceased to be appointed under these laws, since they have been appointed to pupils of either sex, first by the consuls, after inquiry into the case, and subsequently by the prætors under imperial constitutions. For the above-mentioned laws required no security from the tutors for the safety of the pupil's property, nor did they contain any provisions to compel them to discharge the duties of the office.

The power to appoint tutors was given by Claudius to the consuls (SUET. *in Claud.* 23), and transferred by Antoninus Pius (JUL. CAPIT. *in Vit. M. Anton.* 10) to the prætors.

4. Sed hoc jure utimur, ut Romæ quidem præfectus urbis vel prætor

4. Under our present system tutors are appointed at Rome by the præfect

secundum suam jurisdictionem, in provinciis autem præsides ex inquisitione tutores crearent, vel magistratus jussu præsidum, si non sint magnæ pupilli facultates.

of the city, or the prætor, according to his jurisdiction, and, in the provinces, by the *præsides*, after inquiry; or by an inferior magistrate, at the command of the *præses*, if the property of the pupil is only small.

D. xxvi. 5. 1.

The *præfectus urbis* was, from the time of Augustus, an officer who had the superintendence of the city and its police, and power to decide on both civil and criminal cases, his civil jurisdiction extending one hundred miles from the city, his criminal jurisdiction evidently extending over the whole of Italy. (D. i. 12.) As he was considered the direct representative of the emperor, much that previously belonged to the *prætor urbanus* fell gradually into his hands. The *præfectus urbis* appointed tutors in cases where pupils of higher rank and larger fortune were concerned; the *prætor*, when the pupils were of humbler station and smaller fortune; and this it is which is referred to in the words *secundum suam jurisdictionem.*

In the provinces the *præses* appointed; but until Justinian altered the law (see next paragraph), not only could municipal magistrates not appoint without the authority of the *præses*, but no one could be authorised by the *præses* unless he was a magistrate. (D. xxvi. 5. 8.)

5. Nos autem per constitutionem nostram et hujusmodi difficultates hominum resecantes nec exspectata jussione præsidum, disposuimus, si facultas pupilli vel adulti usque ad quingentos solidos valeat, defensores civitatum (una cum ejusdem civitatis religiosissimo antistite vel apud alias publicas personas) vel magistratus, vel juridicum Alexandrinæ civitatis tutores vel curatores creare, legitima cautela secundum ejusdem constitutionis normam præstanda, videlicet eorum periculo, qui eam accipiant.

5. But by one of our constitutions, to do away with the difficulties to which these provisions as to different persons gave rise, and to avoid the necessity of waiting for the order of the *præses*, we have enacted, that if the property of the pupil or minor does not exceed five hundred *solidi*, tutors or curators shall be appointed by the *defensores* of the city (acting in conjunction with the holy bishop, or before other public persons), or by the magistrates, or, in the city of Alexandria, by the judge; but legal security must be given according to the terms of the same constitution, that is to say, at the risk of those who accept it.

C. i. 4. 30.

The constitution of Justinian provided that, where the fortune of the person requiring a tutor or curator did not amount to more than 500 *solidi* (the *aureus*, 1*l.* 1*s.* 6*d.* of English money, after the time of Alexander Severus was called a *solidus*), a local magistrate, without the authorisation of the *præses*, could appoint, not making a formal examination into the position and character of the tutor or curator (*inquisitio*), but merely taking a money security for the faithful performance of his duties.

Si facultas pupilli, &c. This is an ambiguous translation of the clause in the Cod.: *εἴπερ ἄχρι πεντακοσίων χρυσῶν καὶ μόνον τὰ τῆς περιουσίας εἴη τῶν νέων.*

The *defensor* was a magistrate appointed for two years out of the *decuriones* of a city. His principal business was to act as a check on the *præses*, and he had besides a limited civil and criminal jurisdiction.

6. Impuberes autem in tutela esse naturali jure conveniens est, ut is, qui perfectæ ætatis non sit, alterius tutela regatur.

6. It is agreeable to the law of nature, that persons under the age of puberty should be under tutelage, so that persons of tender years may be under the government of another.

GAI. i. 189.

Gaius, in his Institutes, after the words extracted from him in the text, proceeds to contrast with the tutelage of minors, which is an institution natural and necessary in all communities, the tutelage of women, which he considers founded on no reasonable basis. The original reason of this tutelage was probably the incapability of women to share in the proceedings of the *curia*, and their being supposed unfit to go through solemn forms. In default of a testamentary tutor appointed by the father of the woman if she was in his power, or by the husband if she was *in manu*—and it may be mentioned that the husband could by testament either appoint a tutor to his wife *in manu*, or give her the option of choosing one (GAI. i. 148 *et seq.*)—the nearest *agnatus* was the tutor, women being either *alieni juris*, or else under a tutor all their lives; the tutor being allowed in certain cases to transfer his office (GAI. i. 168), and the woman being allowed to demand a substituted tutor in place of one absent. (GAI. i. 173.) The *lex Atilia* and the *lex Julia et Titia* applied to women. (ULP. *Reg.* 11. 18.) The *lex Papia Poppæa* (A.D. 9) exempted from tutelage women who had three children (GAI. i. 145), and a *lex Claudia* (A.D. 45) suppressed the tutelage of the *agnati* altogether in the case of women of free birth, leaving only the tutelage of ascendants and patrons. (GAI. i. 157.) This modified tutelage of women existed in the time of Ulpian (*Reg.* 11. 8), but had fallen into desuetude in the time of Justinian. While the tutelage of women lasted, the woman above puberty (see GAI. i. 190 *et seq.*) managed her own affairs, and the tutor was only called in to give his *auctoritas* on occasions of moment, the prætor interposing to force a tutor to give his authority when necessary, but the prætor would not adopt this course where the tutor was an ascendant or patron, unless some very strong reason existed.

7. Cum igitur pupillorum pupillarumque tutores negotia gerunt, post pubertatem tutelæ judicio rationem reddunt.

7. As tutors administer the affairs of their pupils, they may be compelled to account, by the *actio tutelæ*, when their pupils arrive at puberty.

GAI. i. 191.

The modes by which the faithful discharge of his duty by a tutor was insured are given in the 24th Title.

TIT. XXI. DE AUCTORITATE TUTORUM.

Auctoritas autem tutoris in quibusdam causis necessaria pupillis

In some cases it is necessary that the tutor should authorise the acts of

est, in quibusdam non est necessaria. Ut ecce si quid dari sibi stipulentur, non est necessaria tutoris auctoritas: quod si aliis pupilli promittant, necessaria est: namque placuit, meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore. Unde in his causis, ex quibus mutuæ obligationes nascuntur, in emptionibus, venditionibus, locationibus, conductionibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipsi quidem, qui cum his contrahunt, obligantur, at invicem pupilli non obligantur.

the pupil, in others not. When, for instance, the pupil stipulates for something to be given him, the authorisation of the tutor is not requisite; but if the pupil makes the promise, it is requisite; for the rule is, that pupils may make their condition better, even without the authorisation of their tutor, but not worse unless with the tutor's authorisation. And therefore in all cases of reciprocal obligation, as in contracts of buying, selling, letting, hiring, bailment deposit, if the tutor does not authorise the pupil to enter into the contract, the person who contracts with the pupil is bound, but the pupil is not bound.

D. xix. 1. 13. 29.

The duties of the tutor were twofold: to administer the affairs of the pupil, and to interpose what was termed his authority. It is to the second head of his functions that this Title refers.

There were many things in which the Roman law, in its stricter times, did not allow one person to represent another. Much that to us seems only to belong to private life was bound up with political and public duties and rights. (See Introd. sec. 43.) The law could not contemplate one beneath the age of puberty acting as if he was a member of the *curia*, or any one else coming forward to fill for him his place in the list of citizens. No one could bring actions of strict law in another name, or go through, for another, the fictitious process of *in jure cessio*, or through the forms of manumission and adoption, or perform for another any of those acts to which a solemn ceremony was attached, such as mancipation or stipulation. (D. xl. 2. 24; D. xlvi. 4. 13. 10.) It was necessary that a minor should himself go through the forms and repeat the words requisite for the validity of such transactions; but it was also necessary that the tutor should be present and give his sanction. The *auctoritas* of the tutor was the complement (*auctoritas* is derived from *augeo*) to the symbolical forms through which the child went. (See Introd. sec. 43.) It represented the intention or the mental act on which those forms ultimately rested. If the child could not speak (*infans* from *fari*), no such forms could be used; if he could speak, but could scarcely understand the import of what he said, or, in technical language, if, being still *infanti proximus*, he had as yet little or no *intellectus* (GAI. iii. 109), the tutor could but very rarely, by interposing his sanction, give legal validity to words uttered without understanding. It was only when the act would confer a very great and very clear benefit on the child, that this was allowed; and although the tutor was, to a certain extent, permitted to act for an infant, it was not until a very late period of Roman law that a constitution of Theodosius and Valentinian, A.D. 426 (C. vi. 30. 18. 2), permitted a tutor to enter on an inheritance in the name of an infant. (D. xxix.

2. 9.) But when the child had entered on his eighth year, and was now *pubertati proximus* or approaching thereto, he was considered to have *intellectus*, but not *judicium* (THEOPH. *Paraph.* on Bk. iii. 19. 9); that is, he understood the meaning of the form, but could not decide for himself whether it was to his advantage to go through the act or not. This want of judgment the tutor supplied; and in every case where the tutor gave his sanction, the act was legally valid. Supposing, however, a pupil acted without the *auctoritas* of the tutor, what was the consequence? In the case of contracts the pupil acting without authorisation took every benefit, but sustained no injury from the contract; because while his tender years shielded him, the person with whom he contracted, having by the agreement made a formal expression of his will, must abide the event. But when it is said that a pupil took every benefit of the contract, it must not be understood that he could continue to enjoy at pleasure the advantages of another's property without giving anything for the enjoyment. The original owner might reclaim the property; and if a profit was being derived from its possession, might take that profit to himself. (D. xxvi. 8. 5. 1.) Only he could never make the pupil restore or refund anything that was once gone; and while a pupil could always disclaim an executory contract made to his disadvantage, he could always, through the intervention of his tutor, enforce one that promised to benefit him. (Bk. ii. Tit. 8. 2.) In other cases, however, the act of the pupil without authorisation was altogether invalid, because there was a risk involved; and although it might practically happen that the act would have been advantageous to the pupil, the law guarded him against the risk by making his act invalid. What these cases were is learned from the next paragraph.

1. Neque tamen hereditatem adire neque bonorum possessionem petere neque hereditatem ex fideicommisso suscipere aliter possunt nisi tutoris auctoritate, quamvis lucrosa sit neque ullum damnum habeat.

1. Pupils, however, cannot, without the authorisation of the tutor, enter on an inheritance, demand the possession of goods, or take an inheritance given by a *fideicommissum*, even though to do so would be to their gain, and could involve them in no risk.

D. xxvi. 8. 9. 11.

The *hereditas* was the legal succession to the property of the deceased, the *bonorum possessio* here spoken of was an interest in the property of a deceased person, accorded by the prætor (Bk. iii. Tit. 9), and the *hereditas ex fideicommisso* was a succession received through the intervention of a trustee appointed by the testator. (See Introd. sec. 76.)

2. Tutor autem statim in ipso negotio præsens debet auctor fieri, si hoc pupillo prodesse existimaverit. Post tempus vero aut per

2. A tutor who wishes to authorise any act, which he esteems advantageous to his pupil, should do so at once while the business is going on,

epistulam interposita auctoritas nihil agit.

and in person, for his authorisation is of no effect if given afterwards or by letter.

D. xxvi. 8. 9. 5.

3. Si inter tutorem pupillumve judicium agendum sit, quia ipse tutor in rem suam auctor esse non potest, non prætorius tutor, ut olim, constituitur, sed curator in locum ejus datur, quo interveniente judicium peragitur et eo peracto curator esse desinit.

3. When a suit is to be commenced between a tutor and his pupil, as the tutor cannot give authority with regard to his own cause, a curator, and not, as formerly, a prætorian tutor, is appointed, with whose intervention the suit is carried on, and who ceases to be curator when the suit is determined.

GAI. i. 184.

Although the person who assisted the pupil in an action in which the tutor was concerned did exactly what the tutor did for the pupil in any other action, and thus, as having to authorise the proceedings, might be spoken of as a tutor (ULP. *Reg.* 11. 24), yet, as he was given for a particular purpose, which tutors were not (see Tit. 14. 4), it was very natural that he should, in preference, receive the name of *curator*.

Subsequently the 72nd Novel (cap. 2) provided that, if the pupil became at any time the debtor of the tutor, another tutor should be added to protect the pupil.

TIT. XXII. QUIBUS MODIS TUTELA FINITUR

Pupilli pupillæque cum puberes esse cœperint, tutela liberantur. Pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitu corporis in masculis æstimari volebant. Nostra autem majestas dignum esse castitate temporum nostrorum bene putavit, quod in feminis et antiquis impudicum esse visum est, id est inspectionem habitudinis corporis, hoc etiam in masculos extendere. Et ideo sancta constitutione promulgata, pubertatem in masculis post quartum decimum annum completum illico initium accipere disposuimus, antiquitatis normam in femininis personis bene positam suo ordine relinquentes, ut post duodecimum annum completum viripotentes esse credantur.

Pupils, both male and female, are freed from tutelage when they attain the age of puberty. The ancients judged of puberty in males, not only by their years, but also by the development of their bodies. But we, from a wish to conform to the purity of the present times, have thought it proper, that what seemed, even to the ancients, to be indecent towards females, namely, the inspection of the body, should be thought no less so towards males; and, therefore, by our sacred constitution we have enacted, that puberty in males should be considered to commence immediately on the completion of their fourteenth year; while, as to females, we have preserved the wise rule adopted by the ancients, by which they are esteemed fit for marriage on the completion of their twelfth year.

GAI. i. 196; C. v. 60. 3.

We learn from Gaius and Ulpian (*Reg.* 11. 28) that the Proculians were in favour of a particular age being fixed as that of puberty; the Sabinians wished to let it be decided by nature.

Justinian here decides in favour of the former. All agreed, however, that the age could in no case be taken as later than eighteen years.

1. Item finitur tutela, si adrogati sint adhuc impuberes vel deportati: item si in servitutem pupillus redigatur, ut ingratus a patrono, vel ab hostibus fuerit captus.

1. Tutelage is also determined, if the pupil, before attaining the age of puberty, is either arrogated, or suffers deportation, or is reduced to slavery as guilty of ingratitude on the demand of his patron, or if he becomes a captive.

D. xxvi. 1. 14.

The *pubertati proximus* was considered liable to criminal punishment (Bk. iv. Tit. 1. 18; C. ix. 47. 7), and he might be made a slave for ingratitude towards his patron. If he returned from captivity, the tutelage would recommence. (See Tit. 20. 2.)

2. Sed et si usque ad certam condicionem datus sit testamento, æque evenit, ut desinat esse tutor existente condicione.

2. Again, if a person is appointed by testament to be tutor until a condition is accomplished, he ceases to be tutor on the accomplishment of the condition.

D. xxvi. 1. 14. 5.

3. Simili modo finitur tutela morte vel tutorum vel pupillorum.

3. Tutelage ends also by the death of the tutor, or of the pupil.

D. xxvii. 3. 4.

4. Sed et capitis deminutione tutoris, per quam libertas vel civitas ejus amittitur, omnis tutela perit. Minima autem capitis deminutione tutoris, veluti si se in adoptionem dederit, legitima tantum tutela perit, ceteræ non pereunt. Sed pupilli et pupillæ capitis deminutio, licet minima sit, omnes tutelas tollit.

4. When, again, a tutor, by a *capitis deminutio*, loses his liberty or his citizenship, his tutelage is wholly at an end. But if he undergoes only the least *capitis deminutio*, as when a tutor gives himself in adoption, then only legal tutelage is ended, and not the other kinds; but any *capitis deminutio* of the pupil, even the least, always puts an end to the tutelage.

D. iv. 5. 7; D. xxvi. 4. 2.

The *tutela legitima* belonged to the nearest of the *agnati* in right of his position in the family; but a tutor appointed by testament or by any special means had a charge committed to him personally, and his change of family could not alter this.

The *minima deminutio capitis* suffered by the pupil would make him under the power of the arrogator; and as he would be no longer *sui juris*, he could no longer have a tutor.

5. Præterea qui ad certum tempus testamento dantur tutores, finito eo, deponunt tutelam.

5. A tutor, again, who is appointed by testament to hold office during a certain time, lays down his office when the time is expired.

D. xxvi. 1. 14. 3.

6. Desinunt autem esse tutores, qui vel removentur a tutela ob id, quod suspecti visi sunt, vel ex justa causa sese excusant et onus ad-

6. They also cease to be tutors who are removed from their office on suspicion, or who excuse themselves on good grounds from the burden of

ministrandæ tutelæ deponunt secundum ea, quæ inferius proponemus.

the tutelage, and rid themselves of it according to the rules we shall give hereafter.

D. xxvi. 1. 14. 4.

At the end of the tutelage the pupil could bring an action to make the tutor account (*actio tutelæ directa*); the tutor could bring one to procure indemnification for all losses he had sustained (*actio tutelæ contraria*). (Bk. iii. Tit. 27. 2.) In each case the action could be brought by and against their respective heirs. In the same way there was an action for similar purposes against and in behalf of a curator (*actio utilis, curationis causa directa vel contraria*), which could be brought only when the curatorship ceased.

TIT. XXIII. DE CURATORIBUS.

Masculi puberes et feminæ viripotentes usque ad vicesimum quintum annum completum curatores accipiunt; qui licet puberes sint adhuc tamen hujus ætatis sunt, ut negotia sua tueri non possint.

Males arrived at the age of puberty, and females of a marriageable age, receive curators, until they have completed their twenty-fifth year; for, although they have attained the age of puberty, they are still of an age which makes them unfit to protect their own interests.

GAI. i. 197.

The law of the Twelve Tables provided for the appointment of curators in the case of madmen and prodigals, but did not make any provision for the protection of young persons who had attained the age of puberty. The first enactment on the subject, of which we have any knowledge, is the *lex Plætoria*, or, as it is often written, *Lætoria*, passed before the time of Plautus (*Pseud.* act i. sc. 3: *Lex me perdit quinavicenaria! metuunt credere omnes*), which, fixing the time of the *perfecta ætas* at twenty-five years, provided that any one overreaching a person under that age should be liable to a criminal prosecution and to infamy (CIC. *de Nat. Deor.* 3. 30; *de Off.* 3. 15); and, possibly, it permitted the appointment of curators in cases where a good reason for the appointment was given. The *lex Plætoria* (B.C. 183), however, applied only to cases of fraud. The prætor subsequently provided a remedy, which was a great protection to persons under twenty-five years who came before him, by directing, in all cases where they had been prejudiced, a *restitutio in integrum*; that is, that the applicant should be placed exactly in the position in which he would have been had not the dealings to his prejudice taken place. The minor had not to prove fraud. Finally, Marcus Aurelius ordered that curators should be given in all cases, without inquiry, on the application of the *pubes*. This seems the most probable and consistent account of the matter, which has been the subject of much dispute among commentators. The chief authority is Julius Capitolinus, *in Vita M. Aurel. Anton.* cap. 10, who says: *De curatoribus vero, quum ante non*

nisi ex lege Lætoria vel propter lasciviam vel propter dementiam darentur, ita statuit [M. Antoninus], ut omnes adulti curatorem acciperent non redditis causis.

1. Dantur autem curatores ab iisdem magistratibus, a quibus et tutores. Sed curator testamento non datur, sed datus confirmatur decreto prætoris vel præsidis.

1. Curators are appointed by the same magistrates who appoint tutors. A curator cannot be appointed by testament, but if appointed he may be confirmed in his office by a decree of the prætor or the *præses*.

GAI. i. 198; D. xxvi. 3. 1. 3.

The magistrates who appointed the curators were, therefore, at Rome, the *præfectus urbis* or the prætor; in the provinces, the *præses* or municipal magistrate. (See Tit. 20. 4.) A curator could not be appointed by testament, because it was not certain that the *adolescens* would require one. If he did require one, it was natural that the person named in the testament of the father should be selected by the magistrate as the most proper person.

2. Item inviti adulescentes curatores non accipiunt præterquam in litem: curator enim et ad certam causam dari potest.

2. No adolescent is obliged to receive a curator against his will, unless in case of a law-suit, for a curator may be appointed for a particular special purpose.

D. xxvi. 6. 2. 5.

A person who had attained the age of puberty was not obliged to have a curator; but, practically, he was almost sure, if he had much property, to apply for one, as it was part of his tutor's duty to urge him to do so (D. xxvi. 7. 5. 5), and he could not, at the age of fourteen, be fit to manage his own affairs. There were two other cases, besides that mentioned in the text, in which a curator was given against the will of the adolescent for whom he was appointed. When a debtor wished to pay a debt owed to the adolescent (D. iv. 4. 7. 2), or the tutor to settle his accounts with him (C. v. 31. 7), a curator was appointed to watch the interests of the adolescent, and thus to make the payment and settlement indisputably valid; for if the adolescent was left to himself, and suffered any damage, the prætor would order a *restitutio in integrum*. The curator, once appointed, held his office until the adolescent attained the age of twenty-five, and the minor could not alienate, and perhaps could not contract, without the sanction of his curator; but if an adolescent who had a curator was thought capable of managing his affairs, he might, by the special grant of the emperor, have a dispensation (*venia ætatis*) from waiting for the full age; but it was requisite, to obtain this, that a man should be twenty, and a woman eighteen years of age. (D. iv. 4 3.; C. ii. 45.)

3. Furiosi quoque et prodigi, licet majores viginti quinque annis sint, tamen in curatione sunt adgnatorum ex lege duodecim tabularum. Sed solent Romæ præfectus urbis vel

3. Madmen and prodigals, although past the age of twenty-five, are yet placed under the curatorship of their *agnati* by the law of the Twelve Tables. But, ordinarily, curators are appointed

prætor et in provinciis præsides ex inquisitione eis dare curatores.

for them at Rome by the præfect of the city or the prætor, in the provinces by the *præsides*, after inquiry into the circumstances has been made.

D. xxvii. 10. 1.

The words of the law of the Twelve Tables with regard to the *furiosus* were: *Si furiosus est, agnatorum gentiliumque in eo pecuniaque ejus potestas esto.* (Cic. *de Invent.* ii. 50.) The *prodigus* was first interdicted by the magistrate; and this, Ulpian says, was recognised by custom even before the date of the Twelve Tables: *Lege XII. Tabularum prodigo interdicitur bonorum suorum administratio; quod moribus ab initio interdictum est.* (D. xxvii. 10. 1. pr.) He was then placed under the curatorship of the agnate. Hence Horace says:—

> Interdicto huic omne adimat jus
> Prætor, et ad sanos abeat tutela propinquos.
>
> *Sat.* ii. 3. 218.

While, however, the *prodigus* was interdicted, the *furiosus* was not, and what he did was valid if he was not mad at the particular time when he did it. The form of the interdiction of the *prodigus* is given by Paul: *Quando tibi bona paterna avitaque nequitia tua disperdis, liberosque tuos ad egestatem perducis, ob eam rem tibi ære commercioque interdico.* (*Sent.* iii. 4. a. 7.) The agnates were, however, the *curatores legitimi* of the *prodigus*, under the law of the Twelve Tables, only when the goods he was wasting had come to him as the successor *ab intestato* of an ascendant. (Ulp. *Reg.* xii. 3.) But the prætor extended the interdiction of *prodigi* to all cases where there was a prodigal waste of goods, just as he extended the curatorship of *furiosi* to other forms of madness or incapacity (see next paragraph); and the magistrate appointed the curator in all cases which came under either head of this extension of the law by the prætor. The text further tells us that, although the legal curatorship of the agnate was still recognised in the cases of *furiosi* and *prodigi* wasting goods under an intestate succession to an ascendant, yet in practice the magistrate generally appointed; and even before this practice grew up, the magistrate, if he thought an agnate having the legal right to be curator unfit, would give the practical administration of the property to some one else. (D. xxvii. 10. 13.)

4. Sed et mente captis et surdis et mutis et qui morbo perpetuo laborant, quia rebus suis superesse non possunt, curatores dandi sunt.

4. Persons who are of unsound mind, or who are deaf, dumb, or subject to any incurable malady, since they are unable to manage their own affairs, must be placed under curators.

D. xxvii. 10. 2.

The word *furiosi*, that is, the mad as opposed to the imbecile, in the law of the Twelve Tables, was taken strictly, and there was no legal curator for any one suffering under any other form of mental malady.

The reason why the blind are not included is given by Paul:

Cæco curator dari non potest, quia ipse sibi procuratorem instituere potest. *Sent.* iv. 12. 9.)

5. Interdum autem et pupilli curatores accipiunt, ut puta si legitimus tutor non sit idoneus, quia habenti tutorem tutor dari non potest. Item si testamento datus tutor vel a prætore vel a præside idoneus non sit ad administrationem nec tamen fraudulenter negotia administrat, solet ei curator adjungi. Item in locum tutorum, qui non in perpetuum, sed ad tempus a tutela excusantur, solent curatores dari.

5. Sometimes even pupils receive curators; as, for instance, when the legal tutor is unfit for the office; for a person who already has a tutor cannot have another given him; again, if a tutor appointed by testament, or by the prætor or *præses*, is unfit to administer the affairs of his pupil, although there is nothing fraudulent in the way he administers them, it is usual to appoint a curator to act conjointly with him. It is also usual to assign curators in the place of tutors excused for a time only, and not permanently.

D. xxvi. 1. 13; D. xxvi. 2. 27; D. xxvi. 5. 15 and 16.

6. Quodsi tutor adversa valetudine vel alia necessitate impeditur, quo minus negotia pupilli administrare possit, et pupillus vel absit vel infans sit, quem velit, actorem periculo ipsius prætor vel qui provinciæ præerit, decreto constituet.

6. If a tutor is prevented by illness or otherwise from administering the affairs of his pupil, and his pupil is absent, or an infant, then the prætor or *præses* of the province will, at the tutor's risk, appoint by decree some one to be the agent of the pupil on the nomination of the tutor.

D. xxvi. 7. 24.

This 'actor' is to be distinguished from a curator. He is merely a person who acts under the tutor, and for whom the tutor is responsible. If the pupil was present, and past the age of infancy, he, with the authorisation of the tutor, could appoint the agent, and there would be no necessity for the confirmation of a magistrate; hence the words *et pupillus vel absit vel infans sit.*

The uncertain duration of mental incapacity made the person entrusted with the care of one suffering under it be termed a curator, not a tutor; otherwise the sufferer might be as incapable of going through legal forms as an infant. An adolescent and a *prodigus* could go through all the forms of law, and therefore there was no necessity, in their case, for the curator having an *auctoritas.* If they went through the prescribed forms, they were legally bound, whether the curator consented or not; but unless the curator consented, the prætor would always interpose and relieve them from any consequences that might be prejudicial; and so they were not really bound, unless with the curator's consent.

TIT. XXIV. DE SATISDATIONE TUTORUM VEL CURATORUM.

Ne tamen pupillorum pupillarumve et eorum, qui quæve in curatione sunt, negotia a tutoribus curatoribusve consumantur vel deminuantur, curat prætor, ut et tutores et curatores eo nomine satisdent.

To prevent the property of pupils and persons placed under curators being wasted or destroyed by tutors or curators, the prætor sees that tutors and curators give security against such conduct. But this is not always

Sed hoc non est perpetuum: nam tutores testamento dati satisdare non coguntur, quia fides eorum et diligentia ab ipso testatore probata est; item ex inquisitione tutores vel curatores dati satisdatione non onerantur, quia idonei electi sunt.

necessary; a testamentary tutor is not compelled to give security, as his fidelity and diligence have been recognised by the testator. And tutors and curators appointed upon inquiry are not obliged to give security, because they have been chosen as being proper persons.

GAI. i. 199, 200.

A patron and a father, when tutors, were ordinarily, though not as a matter of right, exempt from the necessity of giving caution. (D. xxvi. 4. 5. 1.) This necessity, therefore, only fell on *tutores* or *curatores legitimi*, and those appointed by inferior magistrates; those appointed by higher magistrates being only appointed after inquiry, which rendered the giving security needless. (See Tit. 20. 4.) The persons who became sureties (for the security demanded was always the guarantee of third persons) went through the form of *fidejussio*. (See Bk. iii. Tit. 20.) The pupil or the person requiring a curator asked the surety whether he guaranteed the safety of the property, *Fide jubesne rem salvam fore?* And he answered, *Fide jubeo*. If the pupil or minor could not go through the ceremony, his slave, or, if he had no slave, or his means did not suffice to buy one, a public slave, went through the form for him; and, when the rule that one free person could not represent another was relaxed, a free person might go through the form for him. (D. xlvi. 6. 2.)

Besides the guarantee taken for the fidelity of the tutor and curator, and the general liability of the whole of the tutor's or curator's property to make good any losses incurred through their neglect, a constitution of Constantine having subjected their property to a tacit hypothec in favour of the pupil or minor (C. v. 37. 20), those entrusted to their care had a further protection in the necessity under which the tutor and curator were to make an inventory of all the property of the pupil or the person requiring a curator (D. xxvi. 7. 3. 2), and after the publication of the 78th Novel, by the tutor or curator being obliged to pledge himself by oath that he would act as a '*bonus paterfamilias*' would act. (Nov. 78, cap. 7.)

1. Sed et si ex testamento vel inquisitione duo pluresve dati fuerint, potest unus offerre satis de indemnitate pupilli vel adulescentis et contutori vel concuratori præferri, ut solus administret, vel ut contutor satis offerens præponatur ei et ipse solus administret. Itaque per se non potest petere satis a contutore vel concuratore suo, sed offerre debet, ut electionem det contutori suo, utrum velit satis accipere an satis dare. Quodsi nemo eorum satis offerat, si quidem adscriptum fuerit a testatore, quis gerat, ille

1. If two or more are appointed by testament, or by a magistrate, after inquiry as tutors or curators, any of them, by offering security for the indemnification of the pupil or adolescent, may be preferred to his co-tutor or co-curator, so that he may either alone administer the property, or may oblige his co-tutor or co-curator to give security, if he wishes to obtain the preference and become the sole administrator. Thus he cannot directly demand security from his co-tutor or co-curator; he must offer it himself, and so give his co-tutor or

gerere debet: quodsi non fuerit adscriptum, quem major pars elegerit, ipse gerere debet, ut edicto prætoris cavetur. Sin autem ipsi tutores dissenserint circa eligendum eum vel eos, qui gerere debent, prætor partes suas interponere debet. Idem et in pluribus ex inquisitione datis probandum est, id est ut major pars eligere possit, per quem administratio fieret.

co-curator the choice to receive or to give security. If no tutor offers security, then the one, if any, appointed by the testator to manage the property shall manage it; but if no tutor is so appointed, then the administration will fall to him whom a majority of the tutors shall choose, as is provided by the prætorian edict. If the tutors disagree in their choice, the prætor must interpose. And in the same way, when several are appointed after inquiry by a magistrate, the majority of those appointed is to determine which of them shall administer.

D. xxvi. 2. 17. 19. 1; D. xxvi. 7. 3. 1. 7, 8, 9.

As it was generally most convenient that one tutor alone should act, although all continued responsible (D. xxvi. 7. 3. 2. 6), it was necessary that the tutor who did act, *tutor onerarius* (opposed to *tutores honorarii*, those who did not act), should give security to the co-tutors. If he did not, he could be compelled, by the means described in the text, either to do so or to allow some other co-tutor to take his place. Sometimes the tutelage was apportioned by the magistrate among the different tutors, and each had a separate duty to perform, for which he alone was responsible. (D. xxvi. 7. 3. 9.)

2. Sciendum autem est, non solum tutores vel curatores pupillis et adultis ceterisque personis ex administratione teneri, sed etiam in eos, qui satisdationem accipiunt, subsidiariam actionem esse, quæ ultimum eis præsidium possit afferre. Subsidiaria autem actio datur in eos, qui vel omnino a tutoribus vel curatoribus satisdari noncuraverint, aut non idonee passi essent caveri. Quæ quidem tam ex prudentium responsis quam ex constitutionibus imperialibus et in heredes eorum extenditur.

2. It should be observed that it is not only tutors and curators who are responsible for their administration to pupils, minors, and the other persons we have mentioned, but, as a last safeguard, a subsidiary action may be brought against the magistrate who has accepted the security as sufficient. The subsidiary action may be brought against a magistrate who has wholly omitted to take security, or has taken insufficient security; and the liability to this action, according to the responses of the jurisprudents, as well as the imperial constitutions, extends also to the heirs of the magistrate.

D. xxvii. 8. 1. 11, 12. 4. 6.

The heirs of the magistrate were only liable where the negligence of the magistrate had been very great. (D. xxvii. 8. 6.)

Adultus, in its strict legal sense, meant one who has reached the age of puberty but not the *perfecta ætas*.

3. Quibus constitutionibus et illud exprimitur, ut, nisi caveant tutores vel curatores, pignoribus captis coerceantur.

3. The same constitutions also expressly enact, that tutors and curators who do not give security, may be compelled to do so by seizure of their goods as pledges.

C. v. 35. 2.

The magistrate would order a portion of their property to be seized, and retained until they gave security. (THEOPHIL. *Paraphr.*)

4. Neque autem præfectus urbis neque prætor neque præses provinciæ neque quis alius, cui tutores dandi jus est, hac actione tenebitur: sed hi tantummodo, qui satisdationem exigere solent.

4. Neither the præfect of the city, nor the prætor, nor the *præses* of a province, nor any one else to whom the appointment of tutors belongs, will be liable to this action, but only those whose ordinary duty it is to exact security,

D. xxvii. 8. 1. 1.

The words of the text, which are borrowed from Ulpian, do not quite accurately describe the law under Justinian, as the municipal magistrates, whose business it was to take security, could in some cases appoint tutors (Tit. 20. 5), and they were always liable to this action.

TIT. XXV. DE EXCUSATIONIBUS TUTORUM VEL CURATORUM.

Excusantur autem tutores vel curatores variis ex causis: plerumque autem propter liberos, sive in potestate sint sive emancipati. Si enim tres liberos quis superstites Romæ habeat vel in Italia quattuor vel in provinciis quinque, a tutela vel cura possunt excusari exemplo ceterorum munerum: nam et tutelam et curam placuit publicum munus esse. Sed adoptivi liberi non prosunt, in adoptionem autem dati naturali patri prosunt. Item nepotes ex filio prosunt, ut in locum patris succedant: ex filia non prosunt. Filii autem superstites tantum ad tutelæ vel curæ muneris excusationem prosunt: defuncti non prosunt. Sed si in bello amissi sunt, quæsitum est, an prosint. Et constat, eos solos prodesse, qui in acie amittuntur: hi enim, quia pro re publica ceciderunt, in perpetuum per gloriam vivere intelleguntur.

Tutors and curators are excused on different grounds; most frequently on account of the number of their children, whether in their power or emancipated. For any one who at Rome has three children living, in Italy four, or in the provinces five, may be excused from being tutor or curator as from other offices, for the office of both a tutor and a curator is considered a public one. Adopted children will not avail the adopter; though given in adoption, they are reckoned in favour of their natural father. Grandchildren by a son may be reckoned in the number, so as to take the place of their father, but not grandchildren by a daughter. It is only those children who are living that can be reckoned to excuse any one from being tutor or curator, and not those who are dead. It has been questioned, however, whether those who have perished in war may not be reckoned; and it has been decided, that those who die in battle may, but they only, for glory renders those immortal who have fallen for their country.

D. xxvii. 1. 2. 2, &c.; D. xxvii. 1. 18.

It was considered a matter of public policy that tutors or curators should act when their assistance was necessary, and therefore those who were appointed were obliged to accept the office, unless they could establish any valid reason for being excused. This Title gives a number of grounds on which a person appointed tutor or curator was excused from holding the office. These grounds of excuse may be classed with tolerable accuracy under four heads. Tutors and curators were excused as—1. Having

rendered a service to the public, or being engaged in the discharge of some public duty (pr. and paragraphs 1, 2, 3, 14, 15); 2. Being in a position adverse to the pupil or adult (paragraphs 4, 9, 11, 12, 19); 3. Being incompetent to sustain the burden of the office (paragraphs 6, 7, 8, 13); 4. Filling or having filled similar offices (5, 18).

It was the *lex Papia Poppœa* (A.D. 9) that first introduced exemption on the ground of the number of the children.

Grandchildren by the daughter were not reckoned, as, otherwise, they would have been reckoned by two different persons, their maternal grandfather and their father or paternal grandfather.

1. Item divus Marcus in semestribus rescripsit, eum, qui res fisci administrat, a tutela vel cura, quamdiu administrat, excusari posse.

1. The Emperor Marcus declared by rescript in his *Semestria*, that a person engaged in administering the property of the *fiscus* is excused from being tutor or curator while his administration lasts.

D. xxvii. 1. 41.

Augustus and Tiberius held a council of senators every six months for the discussion of affairs (SUET. *Aug.* 35); and we gather from the text that the practice was also adopted by Marcus Aurelius, who published the records of the councils under the name of *Semestria*.

2. Item qui rei publicæ causa absunt, a tutela et cura excusantur. Sed et si fuerunt tutores vel curatores, deinde rei publicæ causa abesse cœperunt, a tutela et cura excusantur, quatenus rei publicæ causa absunt, et interea curator loco eorum datur. Qui si reversi fuerint, recipiunt onus tutelæ, nec anni habent vacationem, ut Papinianus responsorum libro quinto scripsit; nam hoc spatium habent ad novas tutelas vocati.

2. Persons absent on the service of the state are excused from being tutors or curators; and if those who have already been appointed either as tutors or curators should afterwards be absent on the public service, they are excused during their absence on such service, and meanwhile a curator is appointed in their place. On their return, they must again take upon them the burden of tutelage; and, according to Papinian's opinion, expressed in the fifth book of his answers, are not entitled to the privilege of a year's dispensation, which is only allowed them when they are called to a new tutelage.

D. xxvii. 1. 10. pr. and 2.

The meaning of the text is that, if they had commenced holding the office of tutor before their absence, they were obliged to resume it immediately on their return. If, when they returned, a new tutelage was imposed on them, they might delay for a year to enter on its duties.

3. Et qui potestatem aliquam habent, excusare se possunt, ut divus Marcus rescripsit, sed cœptam tutelam deserere non possunt.

3. By a rescript of the Emperor Marcus, all persons invested with any public authority may excuse themselves; but they cannot abandon the office of tutor, which they have already undertaken.

D. xxvii. 1. 17. 5.

Qui potestatem aliquam habent: i.e. all magistrates, including municipal magistrates. *Potestas* is here probably contrasted with *dignitas,* which was not a ground of excuse. (D. xxvii. 6. 15. 2.)

4. Item propter litem, quam cum pupillo vel adulto tutor vel curator habet, excusare se nemo potest: nisi forte de omnibus bonis vel hereditate controversia sit.

4. No tutor or curator can excuse himself by alleging a law-suit with the pupil or minor; unless the suit embraces the whole of his property, or is for an inheritance.

D. xxvii. i. 21. pr.

Justinian afterwards, in the 72nd Novel (c. 1), decided that no creditor or debtor of the pupil or minor should be allowed to become tutor or curator.

5. Item tria onera tutelæ non affectatæ vel curæ præstant vacationem, quamdiu administrantur: ut tamen plurium pupillorum tutela vel cura eorundem bonorum, veluti fratrum, pro una computetur.

5. Three tutelages or curatorships, if unsolicited, serve as an excuse from filling any other such office while the holder continues to discharge the duties. But the tutelage of several pupils, or the curatorship of property belonging at once to several persons, as where the pupils or minors are brothers, is reckoned as one only.

D. xxvii. 1. 3. 15, 15

6. Sed et propter paupertatem excusationem tribui tam divi fratres quam per se divus Marcus rescripsit, si quis imparem se oneri injuncto possit docere.

6. Poverty also is a sufficient excuse, when it can be proved to be such as to render a man incapable of the burden imposed upon him, according to the rescripts given both by the imperial brothers together, and by the Emperor Marcus singly.

D. xxvii. 1. 7.

Marcus Aurelius Antoninus and Lucius Verus were the *divi fratres.*

7. Item propter adversam valetudinem, propter quam nec suis quidem negotiis interesse potest, excusatio locum habet.

7. Ill-health, also, if it prevents a man from attending to his own affairs, affords a ground of excuse.

8. Similiter eum, qui litteras nesciret, excusandum esse, divus Pius rescripsit: quamvis et imperiti litterarum possunt ad administrationem negotiorum sufficere.

8. So, too, a person who could not read was to be excused, according to the rescript of the Emperor Antoninus Pius; yet persons who cannot read may have business capabilities.

D. xxvii. 1. 6. 19.

The magistrate would have to decide whether the property was so small, and the position of the pupil or minor so humble, that this ignorance would be no bar.

9. Item si propter inimicitiam aliquem testamento tutorem pater dederit, hoc ipsum præstat ei excusationem: sicut per contrarium non excusantur, qui se tutelam patri

9. If it is through enmity that the father appoints by testament any one as tutor, this circumstance itself will afford a sufficient excuse; just as, on the other hand, they who have pro-

pupillorum administraturos promiserunt.

mised the father of the pupils to fill the office of tutor, cannot be excused.

D. xxvii. 1. 6. 17.

10. Non esse autem admittendam excusationem ejus, qui hoc solo utitur, quod ignotus patri pupillorum sit, divi fratres rescripserunt.

10. That the tutor was unknown to the father of a pupil is not of itself to be admitted as a sufficient excuse, as is decided by a rescript of the imperial brothers.

D. xxvii. 1. 15. 14.

11. Inimicitiæ, quas quis cum patre pupillorum vel adultorum exercuit, si capitales fuerunt nec reconciliatio intervenit, a tutela solent excusare.

11. Enmity against the father of the pupil or minor, if it is of a deadly character, and no reconciliation has taken place, is usually considered as an excuse from being tutor.

D. xxvii. 1. 6. 17.

12. Item si quis status controversiam a pupillorum patre passus est, excusatur a tutela.

12. So, too, he whose *status* has been called in question by the father of the pupil, is excused from the office of tutor.

That is, if the deceased has attempted to show that the person appointed tutor was a slave.

13. Item major septuaginta annis a tutela vel cura se potest excusare. Minores autem viginti et quinque annis olim quidem excusabantur: a nostra autem constitutione prohibentur ad tutelam vel curam adspirare, adeo ut nec excusatione opus fiat. Qua constitutione cavetur, ut nec pupillus ad legitimam tutelam vocetur nec adultus: cum erat incivile, eos, qui alieno auxilio in rebus suis administrandis egere noscuntur et sub aliis reguntur, aliorum tutelam vel curam subire.

13. Persons above seventy years of age may be excused from being tutors or curators. Persons under the age of twenty-five were formerly excused, but, by our constitution, they are now prohibited from aspiring to these offices, so that excuses are become unnecessary. This constitution provides that neither pupils nor minors shall be called to a legal tutelage. For it is absurd that persons who are themselves governed, and are known to need assistance in the administration of their own affairs, should become the tutors or curators of others.

D. xxvii. 1. 2. 10. 7; C. v. 30. 5.

14. Idem et in milite observandum est, ut nec volens ad tutelæ munus admittatur.

14. The same rule holds good also as to military persons. They cannot, even though they wish it, be admitted to the office of tutor or curator.

15. Item Romæ grammatici, rhetores et medici et qui in patria sua id exercent et intra numerum sunt, a tutela vel cura habent vacationem.

15. Grammarians, rhetoricians, and physicians at Rome, and those also who exercise such professions in their own country, and are within the number authorised, are exempted from being tutors or curators.

D. xxvii. 1. 6. 1.

It was Antoninus Pius who fixed the number which each city was to have. (D. xxvii. 1. 6. 2.) The largest provincial city was not allowed to have more than ten physicians, five grammarians, and five rhetoricians.

Philosophers were also excepted (D. xxvii. 1. 6. 5); jurisprudents who were members of the council of the emperor (xxvii. 1. 30); and all *clerici* (C. i. 3. 52).

16. Qui autem se vult excusare, si plures habeat excusationes et de quibusdam non probaverit, aliis uti intra tempora non prohibetur. Qui excusare se volunt, non appellant: sed intra dies quinquaginta continuos, ex quo cognoverunt, excusare se debent (cujuscumque generis sunt, id est qualitercumque dati fuerint tutores), si intra centesimum lapidem sunt ab eo loco, ubi tutores dati sunt: si vero ultra centesimum habitant, dinumeratione facta viginti millium diurnorum et amplius triginta dierum. Quod tamen, ut Scævola dicebat, sic debet computari, ne minus sint quam quinquaginta dies.

16. If a person wishes to excuse himself and has several excuses, even supposing some are not admitted, there is nothing to prevent him employing others, provided he does so within the prescribed time. Those who wish to excuse themselves are not to appeal, but whatever kind of tutors they may be, that is, however they may have been appointed, must offer their excuses within the fifty days next after they have known of their appointment, if they are within a hundred miles of the place where they were appointed. If they are at a greater distance, they are allowed a day for every twenty miles, and thirty days besides; but in calculating the time, as Scævola pointed out, a minimum of fifty days must always be allowed.

D. xxvii. 1. 21. 13.

If he lived anywhere within four hundred miles, he would, reckoning a day for each twenty miles, and thirty days besides, fall short of fifty days, and therefore the rule was laid down that gave him a minimum of fifty days. If he did not excuse himself within the appointed time, he could not afterwards escape the charge.

Dies continui are opposed to *dies utiles*, the days on which legal business could be done; *dies continui* meaning the successive days, of whatever kind.

The ordinary rule was that persons called to a public office had, in order not to serve, to appeal to a higher magistrate than the one appointing them.

17. Datus autem tutor ad universum patrimonium datus esse creditur.

17. The tutor who is appointed is considered as appointed for the whole patrimony.

D. xxvii. 1. 21. 2.

The tutor was appointed for the whole patrimony; but if it was situated in very different parts, he might apply to have other tutors appointed to act in the different localities. (D. xxvii. 1. 21. 2.)

18. Qui tutelam alicujus gessit, invitus curator ejusdem fieri non compellitur, in tantum ut, licet pater, qui testamento tutorem dederit, adjecit, se eundem curatorem dare, tamen invitum eum

18. A person who has discharged the office of tutor is not compelled against his will to become the curator of the same person; so much so, that although the father, after appointing a tutor by testament, adds that he also

curam suscipere non cogendum, divi Severus et Antoninus rescripserunt.

appoints the same person to be curator, the person so appointed, if unwilling, cannot be compelled to take the office of curator; so it has been decided by the rescript of the Emperors Severus and Antoninus.

It is Antoninus Caracalla who is here meant.

19. Iidem rescripserunt, maritum uxori suæ curatorem datum excusare se posse, licet se immisceat.

19. The same emperors have decided by rescript, that a husband appointed as curator to his wife may excuse himself from the office, although he intermeddles with her affairs.

D. xxvii. 1. 1. 5.

The husband not only might excuse himself from the curatorship of his wife, but in the time of Justinian he could not fill the office (C. v. 34. 2); neither could the wife's curator marry her (C. v. 6).

It was the general rule that a tutor or curator who intermeddled with the affairs of the pupil or adult renounced the right of offering excuses.

20. Si quis autem falsis allegationibus excusationem tutelæ meruit, non est liberatus onere tutelæ.

20. If any one has succeeded by false allegations in getting himself excused from the office of tutor, he is not discharged from the burden of the office.

D. xxiii. 2. 60. pr.

Tit. XXVI. DE SUSPECTIS TUTORIBUS ET CURATORIBUS.

Sciendum est suspecti crimen e lege duodecim tabularum descendere.

It is to be observed that the right of accusing a suspected tutor or curator is derived from the law of the Twelve Tables.

D. xxvi. 10. 1. 2.

1. Datum est autem jus removendi suspectos tutores Romæ prætori et in provinciis præsidibus earum et legato proconsulis.

1. The right of removing suspected tutors belongs at Rome to the prætor; in the provinces to the *præsides*, or to the legate of the proconsul.

D. xxvi. 10. 1. 3, 4.

2. Ostendimus, qui possunt de suspecto cognoscere: nunc videamus, qui suspecti fieri possunt. Et quidem omnes tutores possunt, sive testamentarii sint sive alterius generis tutores. Quare et si legitimus sit tutor, accusari poterit. Quid si patronus? Adhuc idem erit dicendum: dummodo meminerimus, famæ patroni parcendum, licet ut suspectus remotus fuerit.

2. We have shown what magistrates may take cognisance of suspected persons: let us now inquire, what persons may become suspected. All tutors may become so, whether testamentary or others; thus even a legal tutor may be accused. But what is the case with a patron? He, too, may be accused; but we must remember, that his reputation must be spared, although he be removed as suspected.

D. xxvi. 10. 1. 5.

The descendants could not bring an action to which infamy attached against an ascendant. They and the *libertus* could only call for the interference of the law to protect their property, not to punish the tutor with infamy. (D. xxxvii. 15. 5.) And in the case of all legal tutors it was customary, except in very bad cases, not to remove them, but to join a curator with them. (D. xxvi. 10. 9.) By *famæ parcendum* is meant that the grounds of the decision for their removal were not to be expressed.

3. Consequens est, ut videamus, qui possint suspectos postulare. Et sciendum est, quasi publicam esse hanc actionem, hoc est omnibus patere. Quin immo et mulieres admittuntur ex rescripto divorum Severi et Antonini, sed hæ solæ, quæ pietatis necessitudine ductæ ad hoc procedunt, ut puta mater: nutrix quoque et avia possunt, potest et soror: sed et si qua mulier fuerit, cujus prætor propensam in pietatem mentem intellexerit non sexus verecundiam egredientem, sed pietate productam non continere injuriam pupillorum, admittit eam ad accusationem.

3. Let us now inquire, by whom suspected persons may be accused. Now an accusation of this sort is in a measure public, that is, it is open to all. Nay, by a rescript of the Emperors Severus and Antoninus, even women are admitted to be accusers; but only those who are irresistibly induced to do so through feelings of affection; as a mother, a nurse, or a grandmother, or a sister, who may all become accusers. But the prætor will admit any woman to make the accusation, in whom he recognises a character that, bent on the fulfilment of duty and not overstepping the modesty of the sex, but animated by dutiful affection, cannot endure that the pupil should suffer harm.

D. xxvi. 10. 1. 6, 7.

The action is called *quasi publica*, because on the one hand it had the private object of securing the pupil's interests, and on the other had, like public actions, criminal consequences, and might be brought by a person not interested in the private rêsult.

Women, as a general rule, could not institute public actions. (D. xlviii. 2. 1.)

4. Impuberes non possunt tutores suos suspectos postulare: puberes autem curatores suos ex consilio necessariorum suspectos possunt arguere: et ita divi Severus et Antoninus rescripserunt.

4. No person below the age of puberty can bring an accusation against his tutor as suspected; but those who have attained that age may, under the advice of their near relations, accuse their curators. Such is the decision given in a rescript of the Emperors Severus and Antoninus.

D. xxvi. 10. 7. pr.

5. Suspectus est autem, et qui non ex fide tutelam gerit, licet solvendo est, ut Julianus quoque scripsit. Sed et antequam incipiat gerere tutelam tutor, posse eum quasi suspectum removeri, idem Julianus scripsit et secundum eum constitutum est.

5. A tutor is suspected who does not faithfully execute his trust, although perfectly solvent, as Julian writes, who also thinks that even before he enters on his office, a tutor may be removed as suspected; and a constitution has been made in accordance with this opinion.

D. xxvi. 10. 8.

Ulpian says that a tutor could not be *suspectus* before he entered

on his office, and that if there was any reason to think him an improper person beforehand, the magistrate would forbid him to assume the administration. (D. xxvi. 10. 3. 5 and 12.) Justinian decides in opposition to this.

6. Suspectus autem remotus, si quidem ob dolum, famosus est: si ob culpam, non æque.

6. A suspected person, if removed on account of fraud, is infamous, but not so if for neglect only.

C. v. 40. 9; D. xxvi. 10. 3. 18.

For the meaning of the word *infamia* see Introd. sec. 48.

7. Si quis autem suspectus postulatur, quoad cognitio finiatur, interdicitur ei administratio, ut Papiniano visum est.

7. If an accusation is brought against any one as suspected, his administration, according to Papinian, is suspended while the accusation is pending.

D. xlvi. 3. 14. 1.

8. Sed si suspecti cognitio suscepta fuerit posteaque tutor vel curator decesserit, extinguitur cognitio suspecti.

8. If a process is commenced against a tutor or curator, as suspected, and he dies while it is going on, the process is at an end.

The action to force the tutor or curator to give in his accounts would be brought against the heirs of the tutor or curator. But the *suspecti cognitio* could not, as its object was to remove the tutor or curator, not to recover money from him. The *crimen suspecti* could only be brought against a person actually tutor or curator, and was at an end if the office came to an end, not only by death, but in any way. (D. xxvi. 10. 11.)

9. Si quis tutor copiam sui non faciat, ut alimenta pupillo decernantur, cavetur epistula divorum Severi et Antonini, ut in possessionem bonorum ejus pupillus mittatur; et quæ mora deteriora futura sunt, dato curatore distrahi jubentur. Ergo ut suspectus removeri poterit, qui non præstat alimenta.

9. If a tutor fails to present himself in order that a certain amount of maintenance may be fixed on for his pupil, it is provided by a rescript of the Emperors Severus and Antoninus, that the pupil shall be put into the possession of the effects of the tutor, and that, after a curator has been appointed for the purpose, any portion of these effects which would be deteriorated in value by delay, may be sold. Therefore a tutor who does not afford maintenance to his pupil may be removed, as suspected.

D. xxvi. 10. 7. 2 and 10. 3. 14.

The prætor generally determined the amount to be annually expended on the maintenance and education of the pupil (the word *alimenta* must be taken very widely), when it was not determined by the testament of the father. The tutor had therefore to attend before the magistrate to state what amount the fortune of the pupil would bear; and if he wilfully neglected to do this, and absented himself, he was treated like a defaulting debtor absenting himself, and the pupil was put in possession of his goods.

10. Sed si quis præsens negat, propter inopiam alimenta posse decerni, si hoc per mendacium dicat, remittendum eum esse ad præfectum urbis puniendum placuit, sicut ille remittitur, qui data pecunia ministerium tutelæ redemit.

10. But if the tutor appears, and alleges that maintenance cannot be decreed in consequence of the smallness of the pupil's estate; then, if he says this falsely, he shall be handed over to the præfect of the city, to be punished, just as a person is handed over who has purchased a tutelage by bribery.

D. xxvi. 10. 3. 15.

The prætor had no criminal jurisdiction, and therefore persons were sent for punishment to the *præfectus urbis*. (D. i. 12. 1.) In the provinces the *præses* could punish, as well as remove, the tutor.

11. Libertus quoque, si fraudulenter gessisse tutelam filiorum vel nepotum patroni probetur, ad præfectum urbis remittitur puniendus.

11. Also a freedman, who is proved to have been guilty of fraud, when acting as tutor to the son or grandson of his patron, is handed over to the præfect of the city to be punished.

D. xxvi. 10. 2.

12. Novissime sciendum est, eos, qui fraudulenter tutelam vel curam administrant, etiamsi satis offerant, removendos a tutela, quia satisdatio propositum tutoris malevolum non mutat, sed diutius grassandi in re familiari facultatem præstat.

12. Lastly, it must be known that they who are guilty of fraud in their administration, must be removed, although they offer sufficient security. For giving security makes no change in the dishonest intentions of the tutor, but only procures him a longer opportunity of injuring the estate.

D. xxvi. 10. 5. 6.

A person is considered thus open to suspicion whose general character and conduct warrant the suspicion. But a zealous and honest man, as we learn in the next paragraph, is not to be removed on suspicion because he is poor.

13. Suspectum enim eum putamus, qui moribus talis est, ut suspectus sit: enimvero tutor vel curator, quamvis pauper est, fidelis tamen et diligens, removendus non est quasi suspectus.

13. We also deem every man suspected, whose conduct is such that we cannot but suspect him. But a tutor or curator who is faithful and diligent, is not to be removed, as a suspected person, merely because he is poor.

D. xxvi. 10. 8.

LIBER SECUNDUS.

TIT. I. DE RERUM DIVISIONE.

HAVING treated in the first book of the law relating to persons, the Institutes now proceed to treat of the law relating to things—that is, they pass from persons who exercise rights to things over which rights are exercised. Rights may be divided into those which we have in or over things as against all the world, and those which we have against particular persons. (See Introd. sec. 61.) The second book of the Institutes, and the first portion of the third, treat of the former class, and of the mode in which they are acquired.

The most proper mode of treating the law of things would be, perhaps, first to inquire of what divisions things themselves are susceptible; next, to divide rights over things (*jura in rem*) according to the extent of the right; and lastly, to treat of the mode in which those rights are acquired. To a certain extent this mode of dividing the subject is adopted in the Institutes, but not very distinctly or expressly. Things themselves may be divided, generally, by making the basis of division either the relation in which they stand to persons, or something inherent in the nature of the things. Things divided in the first way may be divided according as they are the subject of the rights of all men or no men on the one hand, and of particular men on the other, the latter class receiving modifications according to the character in which particular men hold them. This division of things is treated of in the first sections of this Title. The most prominent distinction inherent in things is that of things corporeal and things incorporeal, and this is treated of in the second Title. There are other divisions of things (see Introd. secs. 52-60) which are referred to in the Institutes, but not expressly noticed.

A person may have the whole sum of all rights over a thing, when in Roman law he was said to have the *dominium*. These rights of the *dominus* were summed up in the *jus utendi*, that is, making use of the thing; the *jus fruendi*, that is, reaping the fruits and profits; and the *jus abutendi*, that is, consuming the thing, if capable of consumption. Or any one of the *jura in rem*

may be separated from the rest and enjoyed by different persons. (See Introd. sec. 64.) These fragments of the *dominium*, called servitudes, are treated of in the third and three following Titles. Or a person may have a right over a thing in the ownership of another, limited by the extent to which he has a claim against the owner, as a creditor has over the thing given him in pledge as a security for the debt. This right, generally termed in Roman law the *jus pignoris*, is not spoken of expressly in the Institutes, but a brief sketch of the law on the subject will be found in the conclusion of the notes to the fifth Title.

The Institutes then recur to the modes by which the ownership in things is acquired, and the subject is divided according as ownership is acquired in a particular thing, or in a *universitas rerum*, that is, the aggregate of rights possessed by a particular person. Two of the principal modes of acquiring particular things, occupation, that is, being the first person to appropriate an unappropriated thing, and tradition, that is, the owner handing over the thing to another person with the intention of transferring the ownership, and the transferee receiving the thing with the intention of becoming owner of it, have been treated of in the first Title, as also have certain subordinate modes, e.g. accession, when an owner acquires by the natural increment of the thing owned, and specification, when a new thing is created, and belongs to the creator, even though the materials belonged to another person. All these are said to be modes of acquiring things *jure naturali*. Two modes of acquiring particular things *jure civili* are then noticed. (1.) The sixth Title treats of *usucapion*, the process by which the law attached the legal ownership after a certain length of possession. (2.) The seventh Title treats of certain cases in which gift might be looked on as a different mode of conferring ownership from tradition. This ends the discussion of the modes of acquiring the ownership in particular things. The eighth and ninth Titles speak of certain restrictions on alienation, and of one person acquiring ownership through other persons. In the tenth Title the Institutes proceed to discuss the modes of acquiring a *universitas rerum*. The two chief modes are, the gift of an *hereditas* by testament, and the succession to an *hereditas* in case of intestacy. The subject of testaments occupies the remainder of the second book, and that of succession to an intestate occupies the first nine Titles of the third book. Some minor modes of acquiring a *universitas rerum*, of which arrogation is the most important, are then noticed; and with the twelfth Title of the third book the treatment of *jura in rem*, and of the modes of acquiring ownership in them, is brought to a conclusion. This treatment of the modes of acquisition is subject to the inconvenience noticed by Gaius (ii. 191), that legacies, which are a mode of acquiring specific things, are treated of as coming under the acquisition of a *universitas rerum* by testament.

Previously to the legislation of Justinian, there had been two

other modes of acquisition *jure civili*, applicable both in the case of particular things and in that of a *universitas rerum*, which are treated of by Gaius at considerable length. (GAI. ii. 18-37. See also ULPIAN, *Reg.* 19. 2.) These were mancipation, the process by which *res mancipi* were conveyed from one Roman citizen to another (see Introd. sec. 59), and *in jure cessio*. The *cessio in jure* was a fictitious suit, in which the person who was to acquire the thing claimed (*vindicabat*) the thing as his own, the person who was to transfer it acknowledged the justice of the claim, and the magistrate pronounced it to be the property (*addicebat*) of the claimant. Mancipation and *cessiones in jure* had become obsolete before the time of Justinian. Ulpian (*Reg.* 19. 2) also notices two others, *adjudicatione*, i.e. by property held in common being judicially marked out, so that the portions were owned in severalty (Bk. iv. Tit. 6. 20; and Tit. 17. 4, 5, 6, 7), and *lege*, by some special statute, as when legacies devolved under the *lex Papia Poppæa* (A.D. 9). (Bk. ii. Tit. 20. 8, note.)

The explanation of the term possession, which occurs frequently in this Title, may be conveniently deferred until we reach the sixth Title.

Superiore libro de jure personarum exposuimus: modo videamus de rebus, quæ vel in nostro patrimonio vel extra nostrum patrimonium habentur. Quædam enim naturali jure communia sunt omnium, quædam publica, quædam universitatis, quædam nullius, pleraque singulorum, quæ variis ex causis cuique adquiruntur, sicut ex subjectis apparebit.

In the preceding book we have treated of the law of persons. Let us now speak of things, which either are in our patrimony, or not in our patrimony. For some things by the law of nature are common to all; some are public; some belong to corporate bodies, and some belong to no one. Most things are the property of individuals, who acquire them in different ways, as will appear hereafter.

GAI. ii. 1; D. i. 8. 2.

Under the word *res*, thing, is included whatever is capable of being the subject of a right. The principal division of Gaius is into things *divini juris* and *humani juris*. Here the principal division is according as things are *in nostro patrimonio*, that is, capable of private ownership; or *extra nostrum patrimonium*, that is, not capable of private ownership, and either belonging to all men (*communes*), to the state (*publicæ*), to no men (*nullius*), or to bodies of men (*universitatis*). The words *bona* and *pecunia*, it may be observed, are only used of things *in nostro patrimonio*.

1. Et quidem naturali jure communia sunt omnium hæc: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et ædificiis abstineat, quia non sunt juris gentium, sicut et mare.

1. By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations.

D. i. 8. 2. 1; D. i. 8. 4.

Of things that are common to all any one may take such a portion as he pleases. Thus a man may inhale the air, or float his ship on any part of the sea. As long as he occupies any portion, his occupation is respected; but directly his occupation ceases, the thing occupied again becomes common to all. The sea-shore, that is, the shore as far as the waves go at furthest, was considered to belong to all men. For the purposes of self-defence any nation had a right to occupy the shore and to repel strangers. Individuals, if they built on it, by means of piles or otherwise, were secured in exclusive enjoyment of the portion occupied; but if the building was taken away, their occupancy was at an end, and the spot on which the building stood again became common. (D. i. 8. 6.)

2. Flumina autem omnia et portus publica sunt: ideoque jus piscandi omnibus commune est in portibus fluminibusque.

2. All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.

D. i. 8. 4. 1; D. xlvii. 10. 13. 7.

The word *publicus* is sometimes used as equivalent to *communis*, but is probably used, as here, for what belongs to the people. Things public belong to a particular people, but may be used and enjoyed by all men. Roads, public places, and buildings, might be added to those mentioned in the text. The particular people or nation in whose territory public things lie may permit all the world to make use of them, but exercises a special jurisdiction to prevent any one injuring them. In this light even the shore of the sea was said, though not very strictly, to be a *res publica*: it is not the property of the particular people whose territory is adjacent to the shore, but it belongs to them to see that none of the uses of the shore are lost by the act of individuals. Celsus says, *Litora in quæ populus Romanus imperium habet populi Romani esse arbitror* (D. xliii. 8. 3), where, if we are to bring this opinion of Celsus into harmony with the opinions of other jurists, we must understand '*populi Romani esse*' to mean 'are subject to the guardianship of the Roman people'.

3. Est autem litus maris, quatenus hibernus fluctus maximus excurrit.

3. The sea-shore extends to the limit reached by the greatest winter flood.

D. l. 16. 96.

Celsus ascribes this definition to Cicero, who apparently borrowed it from Aquilius. (CIC. *Top.* 7.)

4. Riparum quoque usus publicus est juris gentium, sicut ipsius fluminis: itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. Sed proprietas earum illorum est, quorum

4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself.

prædiis hærent: qua de causa arbores quoque in iisdem natæ eorundem sunt.

But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons.

D. i. 8. 5.

The banks of rivers belonged to the proprietors of the adjacent lands; but the use of them, for the purposes of navigation or otherwise, was open to all. The proprietors, therefore, could alone reap the profits of the soil; but if they attempted to exercise their rights so as to hinder the public use of the bank, they would be restrained by an interdict of the prætor. (See Introd. sec. 107.)

5. Litorum quoque usus publicus juris gentium est, sicut ipsius maris: et ob id quibuslibet liberum est, casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. Proprietas autem eorum potest intellegi nullius esse, sed ejusdem juris esse, cujus et mare et quæ subjacent mari, terra vel harena.

5. The public use of the sea-shore, too, is part of the law of nations, as is that of the sea itself; and therefore any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the ground or sand beneath it.

D. i. 8. 5. pr. and 1.

The shores over which the Roman people had power were not the property of the Roman people, although it belonged specially to the Roman people to see that the free use of them was not hindered. (See note to paragraph 2.)

6. Universitatis sunt, non singulorum, veluti quæ in civitatibus sunt theatra, stadia et similia et si qua alia sunt communia civitatium.

6. Among things belonging to a corporate body, not to individuals, are, for instance, city theatres, race-courses, and other similar places belonging in common to a whole city.

D. i. 8. 6. 1.

Universitas is a corporate body created by the state, such as municipalities or the guilds (*collegia*) of different trades; for instance, the *collegium pistorum*.

Both the state and corporate bodies might have property which they held exactly like individuals; as, for instance, the *agri vectigales*, or slaves and lands belonging to a *collegium*. Such things were not *universitatis* in the sense in which the words are used here. They were, like the property of individuals, *in nostro patrimonio*, the state or corporation being looked on as any other owner. But some *universitates*, such as municipalities, had things which they owned for the use of the public; and it is these things that are here spoken of as *res universitatis*.

7. Nullius autem sunt res sacræ et religiosæ et sanctæ: quod enim

7. Things sacred, religious, and hallowed, belong to no one; for that

divini juris est, id nullius in bonis est.

which is subject to divine law is not the property of any one.

GAI. ii. 9.

Res nullius are either things unappropriated by any one, in which sense things common, or unoccupied lands, or wild animals, are *res nullius;* or they are things to which a religious character prevents any human right of property attaching.

8. Sacra sunt, quæ rite et per pontifices Deo consecrata sunt, veluti ædes sacræ et dona, quæ rite ad ministerium Dei dedicata sunt, quæ etiam per nostram constitutionem alienari et obligari prohibuimus, excepta causa redemptionis captivorum. Si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. Locus autem, in quo sacræ ædes ædificatæ sunt, etiam diruto ædificio, adhuc sacer manet, ut et Papinianus scripsit.

8. Things are sacred which have been duly consecrated by the pontiffs, as sacred buildings and offerings, properly dedicated to the service of God, which we have forbidden by our constitution to be sold or mortgaged, except for the purpose of purchasing the freedom of captives. But, if any one by his own authority makes anything as it were sacred to himself, it is not sacred, but profane. But ground on which a sacred edifice has once been erected, continues to be sacred, even after the building has been destroyed, as Papinian also writes.

D. i. 8. 6. 3; C. i. 2, 21.

The distinction between *res sacræ* and *religiosæ*, in the older pagan law, was that the former were things dedicated to the celestial gods, the latter were things abandoned to the infernal—*relictæ diis manibus.* (GAI. ii. 4.) In order that a thing should be *sacra*, it was necessary that it should be dedicated by a pontiff and with the authority of the people, afterwards of the senate, finally of the emperor. (D. i. 8. 9. 1.) Things consecrated were by law inalienable. The support of the poor in a time of famine (C. i. 2. 21), and afterwards the payment of the debts of the church (Nov. 120. 10), sufficed, as well as the release of captives, as reasons for the sale of consecrated moveables; but immoveables were always inalienable.

9. Religiosum locum unusquisque sua voluntate facit, dum mortuum infert in locum suum. In communem autem locum purum invito socio inferre non licet: in commune vero sepulcrum etiam invitis ceteris licet inferre. Item si alienus ususfructus est, proprietarium placet, nisi consentiente usufructuario, locum religiosum non facere. In alienum locum, concedente domino, licet inferre: et licet postea ratum habuerit, quam illatus est mortuus, tamen religiosus locus fit.

9. Any man at his pleasure makes a place religious by burying a dead body in his own ground; but it is not permitted to bury a dead body in land hitherto pure, which is held in common, against the wishes of a co-proprietor. But when a sepulchre is held in common, any one co-proprietor may bury in it, even against the wishes of the rest. So, too, if another person has the usufruct, the proprietor may not, without the consent of the usufructuary, render the place religious. But a dead body may be laid in a place belonging to another person, with the consent of the owner; and even if the owner only ratifies the act after the dead body has been buried, yet the place is religious.

GAI. ii. 6; D. i. 8. 6. 4; D. xi. 7.

Directly the body or bones of a dead person, whether slave or free, were buried, the ground in which they were buried became *religiosus*, although previously pure, that is, neither *sacer*, *religiosus*, nor *sanctus* (D. xi. 7. 2. 4), provided that the person burying the body was the owner of the soil or had the consent of the owner.

Although the place was a *res nullius*, yet there could be a special kind of property in it. There were tombs and burial-places in which none but certain persons, as, for instance, members of the same family, could be buried; and this kind of interest in a *locus religiosus* was transmissible to heirs, or even to purchasers of a property, if the right of burying in a particular place was attached, as it might be, to the ownership of that property. (D. xviii. 1. 24.)

10. Sanctæ quoque res, veluti muri et portæ, quodammodo divini juris sunt et ideo nullius in bonis sunt. Ideo autem muros sanctos dicimus, quia pœna capitis constituta sit in eos, qui aliquid in muros deliquerint. Ideo et legum eas partes, quibus pœnas constituimus adversus eos, qui contra leges fecerint, sanctiones vocamus.

10. Hallowed things also, as the walls and gates of a city, are to a certain degree subject to divine law, and therefore are not part of the property of any one. The walls of a city are said to be hallowed, inasmuch as any offence against them is punished capitally; so, too, those parts of laws by which punishments are established against transgressors, we term sanctions.

Gai. ii. 8; D. i. 8. 8; D. i. 8. 9. 3; D. i. 8. 11.

Res sanctæ are those things which, without being sacred, are protected against the injuries of men (*sanctum est quod ab injuria hominum defensum atque munitum est* D. i. 8. 8) by having a severe penalty attached to the violation of their security.

11. Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimur jure naturali, quod, sicut diximus, appellatur jus gentium, quarundam jure civili. Commodius est itaque a vetustiore jure incipere. Palam est autem, vetustius esse naturale jus, quod cum ipso genere humano rerum natura prodidit: civilia enim jura tunc cœperunt esse, cum et civitates condi et magistratus creari et leges scribi cœperunt.

11. Things become the property of individuals in various ways; of some we acquire the ownership by natural law, which, as we have observed, is termed the law of nations; of others by the civil law. It will be most convenient to begin with the more ancient law; and it is very evident that the law of nature, established by nature at the origin of mankind, is the more ancient, for civil laws could then only begin to exist, when states began to be founded, magistrates to be created, and laws to be written.

D. xli. 1. 1.

We now proceed to inquire how property is acquired in particular things. It is acquired either by natural or civil modes. The natural mode first treated of is occupation, of which there are two essential elements; that the thing, the property in which is acquired, should be a *res nullius*, that is, a thing capable of being appropriated, but not yet appropriated, and that the person acquiring it should bring the thing into his possession, that is, into his

power, and do so with the intention of holding it as his property (*pro suo habendi*).

12. Feræ igitur bestiæ et volucres et pisces, id est omnia animalia, quæ in terra mari cælo nascuntur, simulatque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno: plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi, ne ingrediatur. Quidquid autem eorum ceperis, eo usque tuum esse intellegitur, donec tua custodia coercetur: cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit. Naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio.

12. Wild beasts, birds, fish, that is, all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of course any one who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your keeping, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him who captures it. It is considered to have recovered its natural liberty, if it has either escaped out of your sight, or if, although not out of sight, it yet could not be pursued without great difficulty.

GAI. ii. 67; D. xli. 1. 1. 1; D. xli. 1. 3. pr. and 1; D. xli. 1. 3. 2; D. xli. 1. 5.

Directly the thing ceases to be in the power of the occupant, the property in it is lost, and it is exactly as if it had never been seized or occupied. What is meant by being in the power of the occupant must vary according to the nature of the thing occupied. Several examples are given in this and the following paragraphs.

13. Illud quæsitum est, an, si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intellegatur. Quibusdam placuit, statim tuam esse et eo usque tuam videri, donec eam persequaris; quod si desieris persequi, desinere tuam esse et rursus fieri occupantis. Alii non aliter putaverunt tuam esse, quam si ceperis. Sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias.

13. It has been asked, whether, if you have wounded a wild beast, so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly you wound it, and that it continues to be yours while you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion, because many accidents may happen to prevent your capturing it.

D. xli. 1. 5. 1.

Gaius, in this passage of the Digest, informs us that the former opinion was that of Trebatius.

14. Apium quoque natura fera est. Itaque quæ in arbore tua consederint, antequam a te alveo includantur, non magis tuæ esse intelleguntur, quam volucres, quæ in tua arbore nidum fecerint: ideoque si alius eas incluserit, is earum dominus erit. Favos quoque si quos hæ fecerint, quilibet eximere potest. Plane integra re, si provideris ingredientem in fundum tuum, potes eum jure prohibere, ne ingrediatur. Examen, quod ex alveo tuo evolaverit, eo usque tuum esse intellegitur, donec in conspectu tuo est nec difficilis ejus persecutio est: alioquin occupantis fit.

14. Bees also are wild by nature. Therefore, bees that swarm upon your tree, until you have hived them, are no more considered to be your property than the birds which build their nests on your tree; so if any one else hives them he becomes their owner. Any one, too, is at liberty to take the honeycombs the bees may have made. But of course, if, before anything has been taken, you see any one entering on your land, you have a right to prevent his entering. A swarm which has flown from your hive is still considered yours as long as it is in your sight and may easily be pursued; otherwise it becomes the property of the first person that takes it.

D. xli. 1. 5. 2-4.

It is said that the owner of the land, if he wished to secure the bees for himself, must prevent any one entering *integra re;* because if the bees are once taken, they belong to the person who takes them, although the owner of the land may have an action against the person entering against his will.

15. Pavonum et columbarum fera natura est. Nec ad rem pertinet, quod ex consuetudine avolare et revolare solent: nam et apes idem faciunt, quarum constat feram esse naturam: cervos quoque ita quidam mansuetos habent, ut in silvas ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat. In his autem animalibus, quæ ex consuetudine abire et redire solent, talis regula comprobata est, ut eo usque tua esse intellegantur, donec animum revertendi habeant: nam si revertendi animum habere desierint, etiam tua esse desinunt et fiunt occupantium. Revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.

15. Peacocks, too, and pigeons are naturally wild; nor does it make any difference that they are in the habit of flying out and then returning again, for bees, which without doubt are naturally wild, do so too. Some persons have deer so tame, that they will go into the woods, and regularly return again; yet no one denies that deer are naturally wild. But, with respect to animals which are in the habit of going and returning, the rule has been adopted, that they are considered yours as long as they have the intention of returning, but if they cease to have this intention, they cease to be yours, and become the property of the first person that takes them. These animals are supposed to have lost the intention, when they have lost the habit, of returning.

GAI. ii. 68; D. xli. 1. 55.

16. Gallinarum et anserum non est fera natura; idque ex eo possumus intellegere, quod aliæ sunt gallinæ, quas feras vocamus, item alii anseres, quos feros appellamus. Ideoque si anseres tui aut gallinæ tuæ aliquo casu turbati turbatæve evolaverint, licet conspectum tuum effugerint, quocumque tamen loco

16. But fowls and geese are not naturally wild, which we may learn from there being particular kinds of fowls and geese which we term wild. And therefore, if your geese or fowls should be frightened, and take flight, they are still regarded as yours wherever they may be, although you may have lost sight of them; and whoever

sint, tui tuæve esse intelleguntur: et qui lucrandi animo ea animalia retinet, furtum committere intellegitur.

detains such animals with a view to his own profit, commits a theft.

D. xli. 1. 5. 6.

17. Item ea, quæ ex hostibus capimus, jure gentium statim nostra fiunt: adeo quidem, ut et liberi homines in servitutem nostram deducantur, qui tamen, si evaserint nostram potestatem et ad suos reversi fuerint, pristinum statum recipiunt.

17. The things we take from our enemies become immediately ours by the law of nations, so that even freemen thus become our slaves; but if they afterwards escape from us, and return to their own people, they regain their former condition.

GAI. ii. 69; D. xli. 1. 5. 7; D. xli. 1. 7. pr.

The moveables of an enemy were always looked on as *res nullius;* the first person who took them became the owner. Practically, of course, things taken in war did not belong to the particular soldier who took them, unless in very exceptional cases, because he took them as one of a large body, who by their exertions all contributed, directly or indirectly, to the capture. The army, again, did but represent the state; and though moveables were generally given up to the soldiers and divided among them, land taken in war was claimed by the state, whose servants the soldiers were, and in whose behalf they fought.

Just as the freeman, who had been made a prisoner and a slave, regained his *status* when he returned to his own country by the *jus postliminii* (see Bk. i. Tit. 12. 5), so everything that returned to its former state of being free from any owner, was said to do so by a process analogous to the *jus postliminii.* Marcian, for example, speaks in the Digest (i. 8. 6. pr.) of a person building on a shore, and, after having said that the soil is only his while the building remains, goes on, *alioquin ædificio dilapso, quasi jure postliminii revertitur locus in pristinam causam.*

We have no mention here, which we might expect to have, of the mode by which things retaken in war returned to their owners, nor what things did so return. We know that the things that did return were said to do so by *postliminium;* Pomponius says, *quum duæ species postliminii sint, ut aut nos revertamur aut aliquid recipiamus.* (D. xlix. 15. 14.) Generally speaking, if the property of individuals was captured by an enemy and retaken, it was *præda,* that is, was part of the spoil of war, and belonged to the state, not to its former owner. But there were certain things to which a *jus postliminii* attached, and which, if retaken, reverted to their original owner, and did not form part of the *præda.* These things, so far as we know them, were land, slaves, horses, mules, and ships used in war. (CIC. *Top.* 8; D. xlix. 15. 2.)

18. Item lapilli, gemmæ et cetera, quæ in litore inveniuntur, jure naturali statim inventoris fiunt.

18. Precious stones, too, gems, and other things, found upon the sea-shore, become immediately by natural law the property of the finder.

D. i. 8. 3.

In the next section Justinian leaves the subject of acquisition by occupation, but afterwards speaks of matters that properly belong to it, of islands rising in the sea (paragr. 22), and things found which have been intentionally abandoned by their owners (paragr. 47, 48).

19. Item ea, quæ ex animalibus dominio tuo subjectis nata sunt, eodem jure tibi adquiruntur.

19. So, too, all the offspring of animals of which you are the owner, become by the same law your property.

D. xli. 1. 6.

From the 19th to the 37th paragraph inclusive, may be taken together as bearing more or less on the subject of accession. The Latin word *accessio* always means an increase or addition to something previously belonging to us, but commentators have used the word accession not only for the increase itself, but also for the mode in which the increase becomes our property.

First, there is the instance given in this section and in the 35th section of the produce of animals and the fruits of lands belonging to us. They are really part of that which originally belonged to us. The owner of the wheat-seed is potentially the owner of the blade and the ear; the owner of the animal is potentially the owner of its young.

Again, a thing may be an *accessio*, an actual gain or increase to our property, which was in theory of law, but not in fact, ours already. This is the case with an island in a river, an instance given in paragraph 22. The bed of the river becomes *publicus* by the mere fact of the river flowing over it; if any portion of the bed is dried so as to form an island, that portion ceases to be public, and, becoming private, is presumed to be a part of the adjacent land. It is something not newly acquired, but restored to us by nature; we have been temporarily deprived of it, and again resume our rights over it.

Again, a person who uses materials sometimes only gives them a new form, sometimes makes with them a new thing, different from the materials themselves. When he does the latter, the thing he makes, the *nova species*, as the jurists termed it, becomes his by the fact of his making it. The thing did not exist, and he has made it to exist, and it belongs to him by a title not dissimilar to that of occupation: it is a new thing, which he is the first to get into his power. To take an instance given in paragraph 25, a man who makes wine out of another's grapes has made something new of a kind distinct from the grapes themselves, and the wine belongs to him. This specification may be, perhaps, regarded as a distinct mode of acquisition.

Again, when two things belonging to different owners are united so as to become integral portions of a common whole, but one portion is subordinate and inferior to the other, we have to ask whether the owner of the greater became the owner of the less. The Roman jurists answered this by asking whether the

two things could after their union be separated from each other. If this was physically possible, each owner of the respective portions continued to be owner; but if not, the owner of the more important or principal thing became the owner of the less important or accessory thing, for which he gave compensation.

20. Præterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intellegere non possis, quantum quoquo momento temporis adjiciatur.

20. Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase; and that is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time.

GAI. ii. 70; D. xli. 1. 7. 1.

The deposit of earth gradually formed by alluvion upon the bank of a river is inseparable from the native soil of the bank; and the owner of the latter acquires the former by right of accession.

An exception was made in the case of *agri limitati,* that is, lands belonging to the state by right of conquest, and granted or sold in plots. If these plots were enlarged by alluvion, the increase did not become the property of the owner of the plot. (D. xli. 1. 16; xliii. 12. 1. 6.) The reason seems to be that the particles deposited by alluvion were considered public as forming portion of the current of the stream, the waters of which were public, and when these particles were deposited by the side of a plot granted or sold by the state, they were not allowed to enlarge the plot of which the state had already determined the proper size.

21. Quodsi vis fluminis partem aliquam ex tuo prædio detraxerit et vicini prædio appulerit, palam est eam tuam permanere. Plane si longiore tempore fundo vicini hæserit arboresque, quas secum traxerit, in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitæ esse.

21. But if the violence of a river should bear away a portion of your land, and unite it to that of your neighbour, it undoubtedly still continues yours. If, however, it remains for a long time united to your neighbour's land, and the trees, which it swept away with it, take root in his ground, these trees from that time become part of your neighbour's estate.

GAI. ii. 71; D. xli. 1. 7. 2.

When a large mass of earth is carried to the side of a river bank, it is quite possible to detach it, and consequently the mass remains the property of its former owner; but if it becomes inseparable in the manner described in the text, then the property in it is changed.

Videntur acquisitæ (for which is found *videtur acquisita* in the Digest (Florentine MS.)) includes the trees themselves as well as the soil of the fragment.

22. Insula, quæ in mari nata est, quod raro accidit, occupantis fit: nullius enim esse creditur. At in

22. When an island is formed in the sea, which rarely happens, it is the property of the first occupant;

flumine nata, quod frequenter accidit, si quidem mediam partem fluminis teneat, communis est eorum, qui ab utraque parte fluminis prope ripam prædia possident, pro modo latitudinis cujusque fundi, quæ latitudo prope ripam sit. Quodsi alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam prædia possident. Quodsi aliqua parte divisum flumen, deinde infra unitum agrum alicujus in formam insulæ redegerit, ejusdem permanet is ager, cujus et fuerat.

for before occupation it belongs to no one. But when an island is formed in a river, which frequently happens, then if it occupies the middle of the river, it belongs respectively to those who possess the lands near the banks on each side of the river, in proportion to the extent along the banks of each man's estate. But if the island is nearer to one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. But if a river divides itself at a certain point, and lower down unites again, thus giving to any one's land the form of an island, the land still continues to belong to the person to whom it belonged before.

GAI. ii. 72; D. xli. 1. 7. 3, 4.

An island formed by a stream cutting off a portion of land could not be supposed to belong to any one but its former owner. But if the island was formed by the bed of the river becoming dry in any part, it might be doubtful to whom it belonged. The bed of the river, as long as the river flowed over it, was public. *Ille alveus quem sibi flumen fecit, et si privatus antea fuit, incipit tamen esse publicus* (D. xliii. 12. 1. 7); or rather the use of it was public, while the soil itself was the property of the private individuals to whom the soil of the banks belonged, and therefore when the bed was dried, when it had ceased to be subject to public use, the private owners resumed their respective rights of ownership over it. *Quum exsiccatus esset alveus, proximorum fit, quia jam populus eo non utitur.* (D. xli. 1. 30. 1.) If the bed was not wholly but partially dried, the island formed would belong to the owner of the nearest bank, if it lay entirely on one side of the stream; or if it lay partly on one side and partly on the other, it would belong to the owners of both banks in such proportion as a line drawn along the middle of the stream would divide it.

23. Quodsi naturali alveo in universum derelicto alia parte fluere cœperit, prior quidem alveus eorum est, qui prope ripam ejus prædia possident, pro modo scilicet latitudinis cujusque agri, quæ latitudo prope ripam sit; novus autem alveus ejus juris esse incipit, cujus et ipsum flumen, id est publici. Quodsi post aliquod tempus ad priorem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit, qui prope ripam ejus prædia possident.

23. If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent along the banks of their respective estates. The new bed follows the condition of the river, that is, it becomes public. And, if after some time the river returns to its former channel, the new bed again becomes the property of those who possess the lands along its banks.

D. xli. 1. 7. 5.

It might happen that the soil over which the river flowed was known to have belonged to a different person, and not to the

owners of the adjacent banks. If the river changed its channel and left the soil dry, to whom was the recovered land to belong? Could its original owner claim it, or was the presumption of law so fixed in favour of the owners of the adjacent banks that nothing was admitted to rebut it? Gaius says that strict law was against the original owner, but adds, *vix est ut id obtineat* (D. xli. 1. 7. 5); while Pomponius decides expressly for the original owner. (D. xli. 1. 30. 5.)

24. Alia sane causa est, si cujus totus ager inundatus fuerit. Neque enim inundatio speciem fundi commutat et ob id, si recesserit aqua, palam est, eum fundum ejus manere, cujus et fuit.

24. The case is quite different if any one's land is completely inundated; for the inundation does not alter the nature of the land, and therefore, if the water recedes, the land remains indisputably the property of the same owner.

D. xli. 1. 7. 6.

An inundation is here contrasted with a change in the course of a river. A field overflowed with water is still a field, and as much belongs to its owner as if it was dry.

25. Cum ex aliena materia species aliqua facta sit ab aliquo, quæri solet, quis eorum naturali ratione dominus sit, utrum is, qui fecerit, an ille potius, qui materiæ dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel ære vas aliquod fecerit, vel ex alieno vino et melle mulsum miscuerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis navem vel armarium vel subsellium fabricaverit. Et post multas Sabinianorum et Proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse, qui materiæ dominus fuerat; si non possit reduci, eum potius intellegi dominum, qui fecerit: ut ecce vas conflatum potest ad rudem massam æris vel argenti vel auri reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest ac ne mulsum quidem ad vinum et mel resolvi potest. Quodsi partim ex sua materia, partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum aut ex suis et alienis medicamentis emplastrum aut collyrium aut ex sua et aliena lana vestimentum fecerit, dubitan-

25. When one man has given a new form to materials belonging to another, it is often asked which, according to natural reason, ought to be considered the proprietor, whether he who gave the form, or he rather who owned the materials. For instance, suppose a person has made wine, or oil, or wheat, from the grapes, olives, or ears of corn belonging to another; or has cast a vessel out of gold, silver, or brass, belonging to another; has made mead with another man's wine and honey; has composed a plaster, or eye-salve, with another man's medicaments; has made a garment with another's wool; or a ship, a chest, or a bench, with another man's timber. After long controversy between the Sabinians and Proculians, a middle opinion has been adopted, based on the following distinction. If the thing made can be reduced to its former rude materials, then the owner of the materials is also considered the owner of the thing made; but, if the thing cannot be so reduced, then he who made it is the owner of it. For example, a vessel, when cast, can easily be reduced to its rude materials of brass, silver, or gold; but wine, oil, or wheat cannot be reconverted into grapes, olives, or ears of corn; nor can mead be resolved into wine and honey. But if a man has made a new thing, partly with his own materials, and partly with the materials of another, as if he has made

dum non est, hoc casu eum esse dominum, qui fecerit; cum non solum operam suam dedit, sed et partem ejusdem materiæ præstavit.

mead with his own wine and another man's honey, or a plaster or eye-salve, partly with his own, and partly with another man's medicaments, or a garment with his own and also with another man's wool, then in such cases, he who made the thing is undoubtedly the proprietor; since he not only gave his labour, but furnished also a part of the materials.

GAI. ii. 79; D. xli. 1. 7. 7; D. vi. 1. 5. 1; D. xli. 1. 27. 1.

When materials belonging to different persons were mixed together, or one person in good faith bestowed his labour on the materials of another, although one person only might be the owner of the product, yet he did not become so at the expense of others. He was obliged to pay those whose materials or labour had been employed the value of their respective materials or labour, and was liable to a *condictio* or personal action for the enforcement of the payment. He himself could claim the product itself by *vindicatio*, or real action, given only to the owner of a thing. (See Introd. sec. 106.) The jurists very commonly speak of a person being able to vindicate a thing as a mode of saying that he is the owner, the test of ownership being whether the supposed owner could or could not claim the thing by *vindicatio*. If he could bring a *vindicatio*, he could also bring a preliminary action called the *actio ad exhibendum*, the object of which was to have the thing claimed produced to the tribunal, or to get damages if it was not produced.

Supposing a person formed a thing with materials belonging to another, which was the one that could claim it by a real action, the maker of the thing or the owner of the materials? The Proculians said, the thing is a new thing, and its maker is the owner; the Sabinians said, the materials remain, although their form is changed, and their proprietor is the owner of the thing made. The distinction sanctioned by Justinian decided the question according to the fact of there being or not being a really new thing made. If there was, then the reasoning of the Proculians held good, and the maker becomes the owner by a species of occupation, *quia quod factum est, ante nullius fuerat.* (D. xli. 1. 7. 7.) If the thing made was only the old materials in a new form, then it belonged to the owner of the materials in accordance with the opinions of the Sabinians. The opinion of each school, therefore, was admitted where the facts were in accordance with it.

In the latter part of the section Justinian says that if the materials were partly the property of the maker, the thing made certainly belonged to him. This must be understood strictly with reference to the case spoken of in the text, that, namely, of materials, none being merely accessory, i.e. subordinate, to the others, being inseparably mixed together. If some of the materials were only accessory, and the thing made was not a new thing, it would not necessarily belong to the maker, but would only belong

dum non est, hoc casu eum esse dominum, qui fecerit; cum non solum operam suam dedit, sed et partem ejusdem materiæ præstavit.

mead with his own wine and another man's honey, or a plaster or eye-salve, partly with his own, and partly with another man's medicaments, or a garment with his own and also with another man's wool, then in such cases, he who made the thing is undoubtedly the proprietor; since he not only gave his labour, but furnished also a part of the materials.

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to him if he was the owner of the principal materials; and if the different materials were separable from each other, they would still belong to their respective owners.

26. Si tamen alienam purpuram quis intexuit suo vestimento, licet pretiosior est purpura, accessionis vice cedit vestimento: et qui dominus fuit purpuræ, adversus eum, qui subripuit, habet furti actionem et condictionem, sive ipse est, qui vestimentum fecit, sive alius. Nam extinctæ res licet vindicari non possint, condici tamen a furibus et a quibusdam aliis possessoribus possunt.

26. If, however, any one has woven purple belonging to another into his own vestment, the purple, although the more valuable, attaches to the vestment as an accession, and its former owner has an action of theft and a condiction against a person who steals it from him, whether it was he who made the vestment or some one else. For although things which have perished cannot be reclaimed by vindication, yet they give ground for a condiction against the thief, and against some other possessors.

D. x. 4. 7. 2; GAI. ii. 79.

This is an instance of what is termed by commentators *adjunctio*. Ulpian says, in the Digest (x. 4. 7. 2), that a person whose purple was woven in could bring an action *ad exhibendum* against the owner of the vestment. This, which is as much as to say that the owner of the purple is still its owner, seems at variance with what Justinian says here of the purple acceding to the vestment, and of the person, *qui dominus fuit purpuræ*, having only a personal action. Their respective decisions would, however, be right, according as the purple was not or was an inseparable part of the vestment. Supposing the purple was so woven in that it could be again separated, then its owner, remaining its owner, could bring an action *ad exhibendum*. If it was made an inseparable part of the vestment, if it was an *extincta res*, i.e. could no more have a separate, distinct existence, then, being by its nature accessory to the vestment, it would become the property of the owner of the vestment, and its former owner would only have a personal action to recover its value. (D. vi. 1. 23. 5.)

Quibusdam possessoribus. The word *quibusdam* is used to exclude *bona fide* possessors of the *res extincta*, who had not done anything to cause it to perish. Against an actual thief an *actio furti* and a *condictio* might be brought, against others only a *condictio*. (THEOPHIL. *Paraphr.*)

27. Si duorum materiæ ex voluntate dominorum confusæ sint, totum id corpus, quod ex confusione fit, utriusque commune est veluti si qui vina sua confuderint aut massas argenti vel auri conflaverint. Sed si diversæ materiæ sint et ob id propria species facta sit, forte ex vino et melle mulsum aut ex auro et argento electrum, idem juris est: nam et eo casu communem esse

27. If materials belonging to two persons are mixed together by their mutual consent, whatever is thence produced is common to both, as if, for instance, they have intermixed their wines, or melted together their lumps of gold or silver. And although the materials are different which are employed in the admixture, and thus a new substance is formed, as when mead is made with wine and honey,

speciem non dubitatur. Quodsi fortuitu et non voluntate dominorum confusæ fuerint vel diversæ materiæ vel quæ ejusdem generis sunt, idem juris esse placuit.

or electrum by fusing together gold and silver, the rule is the same; for in this case the new substance is undoubtedly common. And if it is by chance, and not by the intention of the proprietors, that materials, whether similar or different, are mixed together, the rule is still the same.

D. xli. 1. 7. 8, 9.

The mixing of liquids is termed by commentators *confusio*. When the product became common property, then any of the joint proprietors could procure their own share to be given up to them by bringing an action called *communi dividundo*. (Bk. iv. Tit. 17. 5.)

28. Quodsi frumentum Titii tuo frumento mixtum fuerit, si quidem ex voluntate vestra, commune erit, quia singula corpora, id est singula grana, quæ cujusque propria fuerunt, ex consensu vestro communicata sunt. Quodsi casu id mixtum fuerit vel Titius id miscuerit sine voluntate tua, non videtur commune esse, quia singula corpora in sua substantia durant nec magis istis casibus commune fit frumentum, quam grex communis esse intellegitur, si pecora Titii tuis pecoribus mixta fuerint; sed si ab alterutro vestrum id totum frumentum retineatur, in rem quidem actio pro modo frumenti cujusque competit, arbitrio autem judicis continetur, ut is æstimet, quale cujusque frumentum fuerit.

28. If the wheat of Titius is mixed with yours, and this takes place by your mutual consent, the mixed heap belongs to you in common; because each body, that is, each grain, which before was the property of one or other of you, has by your mutual consent been made your common property; but if the intermixture was accidental, or made by Titius without your consent, the mixed wheat does not then belong to you both in common; because the grains still remain distinct, and retain their proper substance. The wheat in such a case no more becomes common to you both, than a herd would be, if the cattle of Titius were mixed with yours; but, if either one of you keeps the whole quantity of mixed wheat, the other has a real action for the amount of wheat belonging to him, but it is in the province of the judge to estimate the quality of the wheat which belonged to each.

D. vi. 1. 4. 5.

This mixing together of things not liquid is termed by commentators *commixtio*. If the things mixed, still remaining the property of their former owners, were easy to separate again, as, for instance, cattle united in one herd, when one owner brought his claim by *vindicatio*, his property was restored to him without difficulty; but if there was difficulty in separating the materials from each other, as in dividing the grains of wheat in a heap, the obvious mode would be to distribute the whole heap in shares proportionate to the quantity of wheat belonging to the respective owners. But it might happen that the wheat mixed together was not all of the same quality, and therefore the owner of the better kind of wheat would lose by having a share determined in amount only by the quantity of his wheat; and the judge therefore was

permitted to exercise his judgment (*arbitrio continetur*—see Introd. sec. 106) how great an addition ought to be made to his share to compensate for the superior quality of the wheat originally belonging to him.

29. Cum in suo solo aliquis aliena materia ædificaverit, ipse dominus intellegitur ædificii, quia omne, quod inædificatur, solo cedit. Nec tamen ideo is, qui materiæ dominus fuerat, desinit ejus dominus esse: sed tantisper neque vindicare eam potest neque ad exhibendum de ea re agere propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum ædibus suis injunctum eximere cogatur, sed duplum pro eo præstet per actionem, quæ vocatur de tigno juncto (appellatione autem tigni omnis materia significatur, ex qua ædificia fiunt); quod ideo provisum est, ne ædificia rescindi necesse sit. Sed si aliqua ex causa dirutum sit ædificium, poterit materiæ dominus, si non fuerit duplum jam consecutus, tunc eam vindicare et ad exhibendum agere.

29. If a man builds upon his own ground with the materials of another, he is considered the proprietor of the building, because everything built on the soil accedes to it. The owner of the materials does not, however, cease to be owner, but while the building stands he cannot bring a real action for the materials, or demand to have them exhibited, on account of the law of the Twelve Tables, which provides that no one is to be compelled to take out the *tignum* of another which has been made part of his own building, but that he may be made by the action *de tigno juncto* to pay double the value; and under the term *tignum* all materials for building are comprehended. The object of this provision was to prevent the necessity of buildings being pulled down. But if the building is destroyed from any cause, then the owner of the materials, if he has not already obtained the double value, may bring a real action for the materials, and may demand to have them exhibited.

D. xli. 1. 7. 10.

Materials, although forming part of a building belonging to the owner of the ground, were not considered themselves as necessarily belonging to the owner of the building. They were still the property of the person to whom they had belonged before being employed in the building. They were separable from the soil, and if a special law had not prevented it, could have been claimed by their owner, and their production enforced by an action *ad exhibendum*. The Twelve Tables forbad, however, the needless destruction of buildings, *ne ædificia rescindi necesse sit*. They suspended the right of claiming the materials, or bringing an action *ad exhibendum*, until the building was destroyed. When it was destroyed in any way (*aliqua ex causa*), the materials might be reclaimed, or an action *ad exhibendum* brought. Meanwhile, by an action termed *de tigno juncto*, or, as it is sometimes written, *injuncto*, their owner might, if he preferred, recover double their value, forfeiting, however, thereby all right of eventually reclaiming them.

Such was the law when the builder employed the materials of another quite innocently. If his conduct was tainted with *mala fides*, as it would be if he knew that the materials did not belong to him, the law of the Twelve Tables still prevented the materials being at once reclaimed by the compulsory destruction of the

building; but in addition to the action *de tigno juncto* an action *ad exhibendum* was permitted to be brought as a means of punishing the builder. (D. vi. 1. 23. 6.) The effect of this action in such a case was that the defendant, not producing the thing demanded, was condemned in such a sum as the judge thought right as a punishment for his having put it out of his power to produce it—*quasi dolo fecerit quominus possideat.* (D. xlvii. 3. 1. 2.) Further, if the building was pulled or fell down, the owner of the materials might reclaim them. (D. xlvii. 3. 2.)

30. Ex diverso si quis in alieno solo sua materia domum ædificaverit, illius fit domus, cujus et solum est. Sed hoc casu materiæ dominus proprietatem ejus amittit, quia voluntate ejus alienata intellegitur, utique si non ignorabat, in alieno solo se ædificare: et ideo, licet diruta sit domus, vindicare materiam non poterit. Certe illud constat, si in possessione constituto ædificatore, soli dominus petat domum suam esse nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonæ fidei possessor fuit, qui ædificasset: nam scienti, alienum esse solum, potest culpa objici, quod temere ædificaverit in eo solo, quod intellegeret alienum esse.

30. In the converse case, if any one builds with his own materials on the ground of another, the building becomes the property of him to whom the ground belongs. But in this case the owner of the materials loses his property, because he is presumed to have voluntarily parted with them, that is, if he knew he was building upon another's land; and, therefore, if the building should be destroyed, he cannot, even then, bring a real action for the materials. Of course, if the person who builds is in possession of the soil, and the owner of the soil claims the building, but refuses to pay the price of the materials and the wages of the workmen, the owner may be repelled by an exception of *dolus malus*, provided the builder was in possession *bona fide*. For if he knew that he was not the owner of the soil, he is barred by his own negligence, because he recklessly built on ground which he knew to be the property of another.

GAI. ii. 73, 76; D. xli. 1. 7. 12.

If a person used his own materials in building on the land of another, we have to consider his position, according as he was or was not still in possession, and according as, in building, he had acted *bona fide* or *mala fide*. If he was in possession of the soil, then, if he was acting *bona fide*, he could not be turned out without the owner paying him for the additional value he had by the building given to the soil, this rather than the price of the materials and wages of workmen, as stated in the text, being the measure of compensation. If he was acting *mala fide*, that is, if he knew the soil was not his, he could not claim the additional value, but he might take away the materials he had used, if he could separate them without doing damage. (D. vi. 1. 37.) There is, however, a passage of Paulus (D. v. 3. 38) which would seem to show that, in the opinion of that jurist, the *mala fide* possessor could claim the additional value. If he was not in possession of the soil, he might, whether having acted in good or bad faith (D. xl. 1. 7. 12; C. iii. 32. 2), reclaim the materials if the building was destroyed; and, whether he had acted in good faith or bad,

he could not bring any action for compensation for the additional value.

This statement of the law is, it will be seen, at variance, in one point, with the language of the text, which says that if the owner of the materials knew he was building on another man's land he could not reclaim the materials, because the fact that he knew this was taken to show that he meant to alienate the materials. The passage in the Code above referred to is inconsistent with this. If the owner of the materials meant to give them to the owner of the soil, no question could arise; but the fact that he used his materials, knowing the soil was not his, was declared by the constitution referred to (being a constitution of Antoninus Caracalla), not to imply, as the text takes for granted that it does imply, the intention to alienate the materials; and if there was no such intention, then the materials could be reclaimed even by the *mala fide* possessor. The words of the constitution are—*Materia ad pristinum dominum redit, sive bona fide sive mala ædificium exstructum sit, si non donandi animo ædificia alieno solo imposita sint.* The date of this constitution is A.D. 213, which is posterior to the time of Gaius, from whom the text is taken.

Dolus malus (opposed to *dolus bonus*, artifice which the law considers honestly employed) means nearly what we mean by fraud. When a plaintiff was repelled by an exception of fraud, such words as these were introduced in the *intentio* of the action: *si in ea re nihil dolo malo Auli Agerii factum sit, neque fiat.* (See Introd. sec. 104.)

31. Si Titius alienam plantam in suo solo posuerit, ipsius erit: et ex diverso si Titius suam plantam in Mævii solo posuerit, Mævii planta erit, si modo utroque casu radices egerit. Antequam autem radices egerit, ejus permanet, cujus et fuerat. Adeo autem ex eo, ex quo radices agit planta, proprietas ejus commutatur, ut, si vicini arborem ita terra Titii presserit, ut in ejus fundum radices ageret, Titii effici arborem dicamus: rationem etenim non permittere, ut alterius arbor esse intellegatur, quam cujus in fundum radices egisset. Et ideo prope confinium arbor posita si etiam in vicini fundum radices egerit, communis fit.

31. If Titius places another man's plant in ground belonging to himself, the plant will belong to Titius; conversely, if Titius places his own plant in the ground of Mævius, the plant will belong to Mævius—that is, if, in either case, the plant has taken root; for, before it has taken root, it remains the property of its former owner. But from the time it has taken root, the property in it is changed; so much so, that if the soil of Titius so presses on the tree of a neighbour that the tree takes root in the land of Titius, we pronounce that the tree becomes the property of Titius. For reason does not permit, that a tree should be considered the property of any one else than of him in whose ground it has taken root; and therefore, if a tree, planted near a boundary, extends its roots into the lands of a neighbour, it becomes common.

GAI. ii. 74; D. xli. 1. 7. 13.

The tree, after it had once taken root, did not belong to its former owner, although it was afterwards severed from the soil.

It would seem natural that it should belong to him, because it was separable from the soil, and did not become a part of it more than the materials of a building became part of the soil; but the jurists considered that the nourishment it had drawn from the soil had made it a new tree, *alia facta est* (D. xli. 1. 26. 2), and thus the owner of the soil claimed it by occupation.

When the text says that the tree which strikes root into the soil of Titius belongs to Titius, this is only to be understood of a tree of which all the roots are in the soil of Titius. If only some of the roots were in the soil of Titius, the tree would belong partly to Titius, partly to its former owner.

32. Qua ratione autem plantæ, quæ terra coalescunt, solo cedunt, eadem ratione frumenta quoque, quæ sata sunt, solo cedere intelleguntur. Ceterum sicut is, qui in alieno solo ædificaverit, si ab eo dominus petat ædificium, defendi potest per exceptionem doli mali secundum ea, quæ diximus: ita ejusdem exceptionis auxilio tutus esse potest is, qui alienum fundum sua impensa bona fide consevit.

32. As plants rooted in the earth accede to the soil, so, in the same way, grains of wheat which have been sown are considered to accede to the soil. But as he who has built on the ground of another may, according to what we have said, defend himself by an exception of *dolus malus*, if the proprietor of the ground claims the building, so also he may protect himself by the aid of the same exception, who, at his own expense and acting *bona fide*, has sown another man's land.

GAI. ii. 75, 76; D. xli. 1. 9. pr.

33. Litteræ quoque, licet aureæ sint, perinde chartis membranisque cedunt, acsi solo cedere solent ea, quæ inædificantur aut inseruntur: ideoque si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius, sed tu dominus esse videberis. Sed si a Titio petas, tuos libros tuasve membranas esse, nec impensam scripturæ solvere paratus sis, poterit se Titius defendere per exceptionem doli mali, utique si bona fide earum chartarum membranarumve possessionem nanctus est.

33. Written characters, although of gold, accede to the paper or parchment on which they are written, just as whatever is built on, or sown in, the soil, accedes to the soil. And therefore if Titius has written a poem, a history, or an oration, on your paper or parchment, you, and not Titius, will be the owner of the written paper. But if you claim your books or parchments from Titius, and refuse to defray the cost of the writing, then Titius can defend himself by an exception of *dolus malus;* that is, if it was *bona fide* that he obtained possession of the papers or parchments.

GAI. ii. 77; D. xli. 1. 9. 1.

In this case the letters are inseparable from, and subordinate to, the substance on which they are written, and become at once the property of the owner of that substance.

34. Si quis in aliena tabula pinxerit, quidam putant tabulam picturæ cedere: aliis videtur pictura, qualiscumque sit, tabulæ cedere. Sed nobis videtur melius esse, tabulam picturæ cedere: ridiculum est enim, picturam Apellis vel Parrhasii in accessionem vilissimæ tabulæ cedere. Unde si a domino

34. If a person has painted on the tablet of another, some think that the tablet accedes to the picture, others that the picture, of whatever quality it may be, accedes to the tablet. It seems to us the better opinion, that the tablet should accede to the picture; for it is ridiculous that a painting of Apelles or Parrhasius should be but the accessory

tabulæ imaginem possidente is, qui pinxit, eam petat nec solvat pretium tabulæ, poterit per exceptionem doli mali summoveri: at si is, qui pinxit, possideat, consequens est, ut utilis actio domino tabulæ adversus eum detur, quo casu, si non solvat impensam picturæ, poterit per exceptionem doli mali repelli, utique si bona fide possessor fuerit ille, qui picturam imposuit. Illud enim palam est, quod, sive is, qui pinxit, subripuit tabulas sive alius, competit domino tabularum furti actio.

of a thoroughly worthless tablet. But if the owner of the tablet is in possession of the picture, the painter, should he claim it from him, but refuse to pay the value of the tablet, may be repelled by an exception of *dolus malus*. If the painter is in possession of the picture, the law permits the owner of the tablet to bring a *utilis actio* against him; and in this case if the owner of the tablet does not pay the cost of the picture, he may also be repelled by an exception of *dolus malus;* that is, if the painter obtained possession *bona fide*. For it is clear that if the tablet has been stolen, whether by the painter or any one else, the owner of the tablet may bring an action of theft.

GAI. ii. 78; D. xli. 1. 9. 2

As written characters belong to the owner of the substance on which they are written, it would seem to follow that a painting also would belong to the owner of the substance on which it was painted; and Paul (D. vi. 1. 23. 3) decides that it does, saying that the painting could not exist without the substance on which it was painted, and therefore acceded to it. Gaius, whose opinion is adopted in the text, treats the opposite view as settled law, but says he knows of no sufficient reason why there should be this exception to the rule. The owner of the tablet or substance, on which the painting was painted, had, however, in one way something of the rights of an owner; for if the painter was in possession of the painting, the owner of the tablet was not left only to a personal action for the value of the board, but could claim the board itself. The action by which he did so was termed *utilis*, because it was only an equitable method of protecting him, the prætor allowing him to assert fictitiously that he was the owner. (See Introd. sec. 106.) The direct legal power of claiming the tablet (*vindicatio recta*) was in the painter whose property the tablet had become; but the former owner of the tablet was allowed still to treat it as his, in order to compel the painter to pay its value. If, when the *actio utilis* was brought, the painter paid the value of the tablet, the right of action was at an end, and the owner of the tablet could not get possession of the picture by offering to pay its cost.

Consequens est ut utilis actio, &c. It would not follow from the painter possessing that the owner of the tablet should have a real action of any kind. On the contrary, it was an exception that then he should have one. Therefore *consequens* must be taken as meaning 'in accordance with the principles of law'; or the sentence must be taken as meaning, 'If the painter is in possession,' this circumstance places the owner of the tablet in such a hard position that it is thought right he should have a

utilis actio. The word used in the Digest is not *consequens* but *conveniens*.

35. Si quis a non domino, quem dominum esse crederet, bona fide fundum emerit vel ex donatione aliave qua justa causa æque bona fide acceperit: naturali ratione placuit, fructus, quos percepit, ejus esse pro cultura et cura. Et ideo si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumptis agere non potest. Ei vero, qui sciens alienum fundum possederit, non idem concessum est. Itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere.

35. If any one has *bona fide* purchased land from another, whom he believed to be the true owner, when in fact he was not, or has *bona fide* acquired it from such a person by gift or by any other good title, natural reason demands that the fruits which he has gathered shall be his in return for his care and culture. And therefore, if the real owner afterwards appears and claims his land, he can have no action for fruits which the possessor has consumed. But the same allowance is not made to him who has knowingly been in possession of another's estate; and therefore he is compelled to restore, together with the lands, all the fruits, although they may have been consumed.

D. xli. 1. 48; D. xxii. 1. 45.

Justinian now passes to the interest of a *bona fide* possessor and a usufructuary in the fruits of land, a subject to which he is led by having spoken of other ways in which the interest of the owner of the soil was limited.

A person would be said to possess *bona fide* and *ex justa causa* who had received a thing from a person he believed to be the owner in any method by which ownership could legally pass. (See note on Tit. 6. 10.)

As long as the fruits still adhered to the soil, that is, were still ungathered, they belonged to the owner of the soil. If gathered, but not consumed, they belonged to the *bona fide* possessor as against every one except the owner of the soil. When the owner of the soil claimed them, they became his, for they had only been the property of the *bona fide* possessor *interim* (D. xli. 1. 48), that is, provisionally; but if they had been consumed, the owner of the soil could not recover their value from the *bona fide* possessor. The *mala fide* possessor, on the contrary, was obliged to give the value even of those that were consumed (*restituere fructus consumptos*).

There seems little doubt that the interest of the *bona fide* possessor extended over all the fruits of the land, and not only over those produced by his cultivation and care (see D. xli. 1. 48), although Pomponius (D. xxii. 1. 45) seems to limit it to the latter.

36. Is, ad quem usus fructus fundi pertinet, non aliter fructuum dominus efficitur, quam si eos ipse perceperit. Et ideo licet maturis fructibus, nondum tamen perceptis, decesserit, ad heredem ejus non per-

36. The usufructuary of land does not become owner of the fruits until he has himself gathered them; and therefore, if he should die while the fruits, although ripe, are yet ungathered, they do not belong to his heir, but are

tinent, sed domino proprietatis adquiruntur. Eadem fere et de colono dicuntur.

the property of the owner of the soil. And nearly the same may be said of the farmer.

The interest of the usufructuary has a special Title (Tit. 4) devoted to it, and all remarks upon it may be reserved till we arrive at that Title.

Eadem fere. The heirs of the *colonus* (here used for any person farming land let to him) could gather fruits not gathered by him, for his rights did not perish with him; but the ungathered fruits were legally the property of the owner, and the farmer had to sue through him if they were taken away. (D. xix. 2. 60. 5; C. iv. 65. 10.)

37. In pecudum fructu etiam fetus est, sicuti lac et pilus et lana: itaque agni et hædi et vituli et equuli statim naturali jure dominii sunt fructuarii. Partus vero ancillæ in fructu non est, itaque ad dominum proprietatis pertinent; absurdum enim videbatur, hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit.

37. In the fruits of animals are included their young, as well as their milk, hair, and wool; and therefore lambs, kids, calves, and colts, immediately on their birth become, by the law of nature, the property of the usufructuary; but the offspring of a female slave is not reckoned among fruits, but belongs to the owner of the property. For it seemed absurd that man should be reckoned among fruits, when it is for man's benefit that all fruits are provided by nature.

D. xxii. 1. 28.

Ulpian gives as a reason for the children of slaves not being *in fructu*, that *non temere ancillæ ejus rei causa comparantur, ut pariant.* (D. v. 3. 27.) There were, however, many animals, cows or mares for instance, used for draught, that could not be said to be expressly destined to bear offspring, and yet their offspring was *in fructu.*

38. Sed si gregis usumfructum quis habeat, in locum demortuorum capitum ex fetu fructuarius summittere debet, ut et Juliano visum est, et in vinearum demortuarum vel arborum locum alias debet substituere. Recte enim colere debet et quasi bonus paterfamilias uti.

38. The usufructuary of a flock ought to replace any of the flock that may happen to die, by supplying the deficiency out of the young, as Julian too was of opinion. So, too, the usufructuary ought to supply the place of dead vines or trees. For he ought to cultivate with care, and to use everything as a good *paterfamilias* would use it.

This paragraph relates entirely to the subject of Title 4.

39. Thesauros, quos quis in suo loco invenerit, divus Hadrianus, naturalem æquitatem secutus, ei concessit, qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera, sed fortuito invenerit, dimi-

39. The Emperor Hadrian, in accordance with natural equity, allowed any treasure found by a man in his own land to belong to the finder, as also any treasure found by chance in a sacred or religious place. But if any one found treasure without any express search, but by mere chance, in a place

dium domino soli concessit. Et convenienter, si quis in Cæsaris loco invenerit, dimidium inventoris, dimidium Cæsaris esse statuit. Cui conveniens est, et si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis.

belonging to another, the emperor granted half to the finder and half to the proprietor of the soil; and on the same principle he ordered that, if anything was found in a place belonging to the emperor, half should belong to the finder, and half to the emperor. And consistently with this, if a man finds anything in a place belonging to a city or to the *fiscus*, half belongs to the finder, and half to the *fiscus* or the city.

D. xli. 1. 63. pr.; D. xlix. 14. 3. 10.

Thesaurus, says Paul (D. xli. 1. 31. 1), *est vetus quædam depositio pecuniæ* (that is, of anything valuable), *cujus non extat memoria, ut jam dominum non habeat.* Of course if it was known who placed it there, it was known to whom it belonged. But a treasure, though its depositor was unknown, was not considered exactly as a *res nullius.* The owner of the land in which it was found had always some interest in it. If he found it himself, it all belonged to him; if another person found it, the finder and the owner of the land divided it equally. When there was no owner of the land, as when the place was sacred or religious, the finder took it all. But no one was allowed to make the search for treasure an excuse for digging up tombs and sacred places, or for digging up other men's ground; and therefore it was only when the discovery was quite accidental, and the finder had made no search for it, that the treasure, or the half of it, as the case might be, was permitted to belong to him.

40. Per traditionem quoque jure naturali res nobis adquiruntur: nihil enim tam conveniens est naturali æquitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi. Et ideo cujuscumque generis sit corporalis res, tradi potest et a domino tradita alienatur. Itaque stipendiaria quoque et tributaria prædia eodem modo alienantur. Vocantur autem stipendiaria et tributaria prædia, quæ in provinciis sunt, inter quæ nec non Italica prædia ex nostra constitutione nulla differentia est.

40. Another mode of acquiring things according to natural law is tradition; for nothing is more conformable to natural equity than that the wishes of a person, who is desirous to transfer his property to another, should be confirmed. And therefore corporeal things, of whatever kind, may be passed by tradition, and, when so passed by their owner, are made the property of another. In this way are alienated stipendiary and tributary lands, that is, lands in the provinces, between which and Italian lands there is now, by our constitution, no difference.

D. xli. 1. 9. 3; C. vii. 31.

Before the property in a thing could be transferred from one person to another, it was necessary that the process should be complete in four points:—1. The person who transferred it must be the owner; 2. He must place the person to whom he transferred it in legal possession of the thing; 3. He must transfer the

thing with intention to pass the property in it; 4. The person to whom it was transferred must receive it with intention to become the owner.

The placing another in legal possession of a thing was termed the *traditio* of that thing. In the simplest case, that of a portable moveable, the owner might really hand over the thing to the person who was to become its possessor; but in no case was it necessary that this should be done; what was necessary was that the party who was to receive it should have the thing in his power, and that the two parties should express, in any way whatever, the wish of the one to transfer, of the other to accept, the possession. The thing need not be touched; land, for instance, need not be entered on; but the person who was to be placed in possession must have the thing before him, so as to be able, by a physical act, to exercise power over it. (See SAVIGNY on *Possession*, Bk. ii. secs. 16 and 17.)

Property could not be transferred by mere agreement. (*Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur.* C. ii. 3. 20.) The agreement was but the expression of the intention of the parties; and this was ineffectual unless it was accompanied by the party being placed in possession to whom the thing was to be transferred.

Prædia stipendiaria were provincial lands belonging to the people, *tributaria* provincial lands belonging to the emperor. (GAI. ii. 21.) It will be remembered that so long as the distinction remained between Italian and provincial land the *Italicum solum* was a *res mancipi*, and could only be transferred by the peculiar form of *mancipatio*. (See Introd. sec. 59.) The distinction had long been obsolete, and was formally abolished by Justinian. (C. vii. 31.)

41. Sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur, sine dubio transferuntur: venditæ vero et traditæ non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. Quod cavetur quidem etiam lege duodecim tabularum: tamen recte dicitur et jure gentium, id est jure naturali, id effici. Sed et si is, qui vendidit, fidem emptoris secutus fuerit, dicendum est, statim rem emptoris fieri.

41. If things are delivered by way of gift or as a *dos* or for any other purpose, the property in them is no doubt transferred. But things sold and delivered are not acquired by the buyer until he has paid the seller the price, or satisfied him in some way or other, as by procuring some third person who promises to pay, or by giving a pledge. And, although this is provided by a law of the Twelve Tables, yet it may be rightly said to spring from the law of nations, that is, the law of nature. But if the seller has accepted the credit of the buyer, the thing then becomes immediately the property of the buyer.

D. xviii. 1. 19. 53.

The seller would generally not have the intention to transfer the property until he received the price; but he might be content to look to another person for the payment of the price, or he might choose to accept the credit of the buyer instead of the price itself;

and if, in either of these cases, he intended to pass the property, it would pass at once, irrespectively of the price being paid. For the meaning of *expromissor*, see Bk. iii. Tit. 29. 3.

42. Nihil autem interest, utrum ipse dominus tradat alicui rem, an voluntate ejus alius.

42. It is immaterial whether the owner delivers the thing himself or some one else by his desire.

D. xli. 1. 9. 4.

43. Qua ratione, si cui libera negotiorum administratio a domino permissa fuerit isque ex his negotiis rem vendiderit et tradiderit facit eam accipientis.

43. Hence, if any one is entrusted by an owner with the uncontrolled administration of his goods, and he sells and delivers anything which is a part of these goods, he passes the property in it to the person who receives the thing.

D. xli. 1. 9. 4.

By the will of the owner, the manager of the property is able to deal with it; and if he deals with it, the will of the owner is expressed through him.

44. Interdum etiam sine traditione nuda voluntas sufficit domini ad rem transferendam, veluti si rem, quam tibi aliquis commodavit aut locavit aut apud te deposuit, vendiderit tibi aut donaverit. Quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso, quod patitur tuam esse, statim adquiritur tibi proprietas perinde ac si eo nomine tradita fuisset.

44. Sometimes even the mere wish of the owner, without tradition, is sufficient to transfer the property in a thing, as when a person has lent or let to you anything, or deposited anything with you, and then afterwards sells or gives it to you. For, although he has not delivered it to you by way of sale or gift, yet by the mere fact of his consenting to its becoming yours, you instantly acquire the property in it, as fully as if it had actually been delivered to you for the express purpose of passing the property.

D. xli. 1. 9. 5.

When the person to whom the property in the thing was transferred was already in physical possession of the thing, then, if the wishes of the parties to give and to receive the property in it were added to this, and the person who affected to give the property was the real owner, all the conditions of a transfer were complete. It made no difference what was their respective order in time. Generally the expression of will would precede the placing in possession, but not necessarily. When the person to whom the property in the thing was transferred had only the mere detention of the thing, that is, had it in his keeping and power as a hirer or depositary would have, but had not also the intention of dealing with it as an owner, all that was necessary to change this detention into possession and ownership was a change in the *animus* with which it was held. The intention to hold it as an owner was sufficiently shown by accepting the transfer of the property. The person, in like manner, who transferred the property, by doing so sufficiently showed his intention of placing the other in possession.

Thus the different elements of *traditio* were broken up and separated, not, as usual, united in a single act; and this is what is meant in the text by saying the property passes *sine traditione.*

45. Item si quis merces in horreo depositas vendiderit, simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.

45. So, too, any one, who has sold goods deposited in a warehouse, as soon as he has handed over the keys of the warehouse to the buyer, transfers to the buyer the property in the goods.

D. xli. 1. 9. 6.

Apparently, if we may judge from the statement of Papinian, it was also requisite that the key should be given *apud horrea,* at the warehouse. (D. xviii. 1. 74.) A person who was at the warehouse and had the key in his hand was in a position to exercise immediate power over the contents of the warehouse; the goods were in his custody, and he was thus placed in possession of them. The key was not symbolical, but was the means by which he was enabled to deal with the goods as an owner.

46. Hoc amplius interdum et in incertam personam collocata voluntas domini transfert rei proprietatem: ut ecce prætores vel consules, qui missilia jactant in vulgus, ignorant, quid eorum quisque excepturus sit, et tamen, quia volunt, quod quisque exceperit, ejus esse, statim eum dominum efficiunt.

46. Nay, more, sometimes the intention of an owner, although directed only towards an uncertain person, transfers the property in a thing. For instance, when the prætors or consuls throw their largesses to the mob, they do not know what each person in the mob will get; but as it is their intention that each should have what he gets, they make what each gets immediately belong to him.

D. xli. 1. 9. 7.

47. Qua ratione verius esse videtur et, si rem pro derelicto a domino habitam occupaverit quis, statim eum dominum effici. Pro derelicto autem habetur, quod dominus ea mente abjecerit, ut id rerum suarum esse nollet, ideoque statim dominus esse desinit.

47. Accordingly it is quite true to say that anything which is seized on, when it has been treated as abandoned by its owner, becomes immediately the property of the person who takes possession of it. And anything is considered as abandoned, which its owner has thrown away with the intention no longer to have it as a part of his property; for thereby it immediately ceases to belong to him.

D. xli. 7. 1.

It might seem as if the property in things abandoned was transferred, like that in things thrown to the mob, by the wish of the owner to transfer it to the person who should first take possession of it; but it is much more natural to consider, with the text, that the thing becomes a *res nullius* by being abandoned, and the property of the first occupant by being taken possession of.

48. Alia causa est earum rerum, quæ in tempestate maris levandæ navis causa ejiciuntur. Hæ enim

48. It is otherwise with respect to things thrown overboard in a storm, to lighten a vessel; for they remain

dominorum permanent, quia palam est, eas non eo animo ejici, quo quis eas habere non vult, sed quo magis cum ipsa navi periculum maris effugiat: qua de causa si quis eas fluctibus expulsas vel etiam in ipso mari nactus lucrandi animo abstulerit, furtum committit. Nec longe discedere videntur ab his, quæ de rheda currente, non intellegentibus dominis cadunt.

the property of their owners; as it is evident that they are not thrown away through a wish to get rid of them, but in order that their owner, together with the ship itself, may more easily escape the dangers of the sea. Hence, any one who, with a view to profit himself by such things, takes them away when washed on shore, or when he has found them in the sea, is guilty of theft. And much the same may be said as to things which drop from a carriage in motion, without the knowledge of their owners.

D. xli. 1. 9. 8; D. xlvii. 43. 4.

A thing could not be considered as abandoned and made a *res nullius* unless its owner intended to cease to be its owner.

TIT. II. DE REBUS INCORPORALIBUS.

Quædam præterea res corporales sunt, quædam incorporales.

Certain things, again, are corporeal, others incorporeal.

GAI. ii. 12; D. i. 8. 1. 1.

Justinian, after having spoken of the natural modes of acquiring property in things, returns in this Title to the division of things, and adds one more division, that of things corporeal and incorporeal, to the divisions given at the beginning of the last Title. Our senses tell us what things corporeal are: things incorporeal are rights, that is, fixed relations in which men stand to things or to other men, relations giving them power over things or claims against persons. And these rights are themselves the objects of rights, and thus fall under the definition of things. For instance, the right to walk over another man's land is said to be an incorporeal thing; for we may have a claim or right to have this right, exactly as, if the land belonged to us, we should have a right to have the land. These rights over things were termed *jura in rem*, and these *jura in rem*, some of the more important of which are treated of in this part of the Institutes, were almost exactly on the footing of '*res*' in Roman law, and were the subjects of real actions equally with things corporeal. (See Introd. sec. 50.) This language of Roman law is rather in accordance with popular language and practical convenience than theoretically accurate. Strictly speaking, the ownership of a field is just as much incorporeal as the ownership of a right of way over a field, and in both cases the law only treats of the corporeal thing, the field, with reference to the incorporeal rights.

We can hardly speak of the possession of a thing incorporeal, but still the actual exercise of the right so much resembles the occupation and using of a corporeal thing, that the term *quasi-possessio* has been employed to denote the position of a person

who exercises the right without opposition, and exercises it as if he was its owner. As little can we speak of the *traditio* or delivery of a right; but just as *quasi-possessio* is used to express a position analogous to that of a *possessor*, so *quasi-traditio* is a term used to signify the placing of a person in this position.

1. Corporales eæ sunt, quæ sui natura tangi possunt: veluti fundus, homo, vestis, aurum, argentum et denique aliæ res innumerabiles.

1. Corporeal things are those which are by their nature tangible, as land, a slave, a garment, gold, silver, and other things innumerable.

GAI. ii. 13; D. i. 8. 1. 1.

2. Incorporales autem sunt, quæ tangi non possunt. Qualia sunt ea, quæ in jure consistunt: sicut hereditas, ususfructus, usus, obligationes quoquo modo contractæ. Nec ad rem pertinet, quod in hereditate res corporales continentur: nam et fructus, qui ex fundo percipiuntur, corporales sunt et id, quod ex aliqua obligatione nobis debetur, plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum jus hereditatis et ipsum jus utendifruendi et ipsum jus obligationis incorporale est.

2. Incorporeal things are those which are not tangible. They are such as consist in a right, as an inheritance, a usufruct, a use, or obligations in whatever way contracted. Nor does it make any difference that things corporeal are contained in an inheritance; for fruits, gathered by the usufructuary, are corporeal; and that which is due to us by virtue of an obligation, is generally a corporeal thing, as a field, a slave, or money; while the right of inheritance, the right of usufruct, and the right of obligation, are incorporeal.

GAI. ii. 14; D. i. 8. 1. 1.

3. Eodem numero sunt jura prædiorum urbanorum et rusticorum, quæ et servitutes vocantur.

3. Among things incorporeal are the rights over estates, urban and rural, which are also called servitudes.

GAI. ii. 14; D. i. 8. 1. 1.

In the last section it was said that usufruct, a personal servitude, was an incorporeal thing, and the same is now said of real or prædial servitudes. This is intended as an observation preliminary to the next three Titles, which treat of servitudes. By servitudes are meant certain portions or fragments of the right of ownership separated from the rest, and enjoyed by persons other than the owner of the thing itself. When the servitude was given to a particular person, it was said to be a personal servitude. When it was associated with the ownership of another thing, so that whoever was the owner of this other thing was the owner of the servitude, the servitude was said to be a real or prædial servitude; the latter term being used because it was indispensable that there should be an immoveable thing (see paragraph 3 of next Title), in virtue of which the right given by the servitude was exercised; and the word *prædium*, being taken in a general sense, was used to denote this immoveable. The thing over which the prædial servitude was exercised was also always an immoveable. Things over which servitudes, whether personal or prædial, were exercised, were said to *serve* the person to whom or the thing to which the servitude was attached; and hence the terms *servitus, res serviens,*

were employed, the thing in right of which the servitude was enjoyed being, in opposition, termed *res dominans*. (See Introd. sec. 64.)

No one could have a servitude over his own thing, *nulli res sua servit*. (D. viii. 2. 26.) For as he was the owner of all the portions into which the right of ownership was separable, he could not have a second right of ownership over any one portion separated from the rest. Again, as a servitude was the subtraction of some one portion of ownership, it did not have the effect of making the owner of the *res serviens* do any positive act; its force was either to make him undergo something, as that another should exercise a certain power over a thing of which he was owner, or to make him abstain from doing something which as owner of the thing he had power to do. *Servitutum non ea natura est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat.* (D. viii. 1. 15. 1.) Lastly, it may be observed that a prædial servitude was indivisible; the person who enjoyed the servitude could not break up this fragment of ownership into lesser fragments, but a usufruct could be divided.

TIT. III. DE SERVITUTIBUS.

Rusticorum prædiorum jura sunt hæc: iter, actus, via, aquæ ductus. Iter est jus eundi, ambulandi homini, non etiam jumentum agendi vel vehiculum: actus est jus agendi vel jumentum vel vehiculum. Itaque qui iter habet, actum non habet; qui actum habet, et iter habet eoque uti potest etiam sine jumento. Via est jus eundi et agendi et ambulandi: nam et iter et actum in se via continet. Aquæ ductus est jus aquæ ducendæ per fundum alienum.

The servitudes of rural immoveables are, *iter*, *actus*, *via*, and *aquæ ductus*. *Iter* is the right of going or passing for a man, not of driving beasts or vehicles. *Actus* is the right of driving beasts or vehicles. So a man who has the right of passage simply has not the right of passage for beasts or vehicles; but if he has the latter right he has the former, and he may use the right of passage without having any beasts with him. *Via* is the right of going, of driving beasts or vehicles, and of walking; for the right of way includes the right of passage, and the right of passage for beasts or vehicles. *Aquæ ductus* is the right of conducting water through the land of another.

D. viii. 3. 1. pr.

For *prædium* there is no exact English equivalent. 'Estate' suffices when we are speaking of a *prædium rusticum*, but it is scarcely consonant with usage to speak of a house as an 'urban estate'. The French *immeuble* exactly corresponds to *prædium*, and, perhaps, by borrowing the term 'immoveable' we approach as nearly to *prædium* as the language will permit.

Prædial servitudes, that is, servitudes possessed over one immoveable in right of having another immoveable, were divided

into those of rural and urban immoveables (*prædia rustica et urbana*). The distinction undoubtedly arose from the one kind being more common in the country, the other in the town. But the distinction, as it was practically understood, soon lost the traces of its origin; and a servitude was said to be that of a rural immoveable when it was one which affected the soil itself, and that of an urban immoveable when it was one which affected the *superficies*, that is, anything raised upon the soil. *Servitutes prædiorum aliæ in solo, aliæ in superficie consistunt.* (D. viii. 1. 3.) If the servitude was one which affected the soil, and for the enjoyment of which the soil itself sufficed, as, for instance, the right to traverse another man's land, or to draw water from his spring, it made no difference where the land or the spring was situated. They might be in the heart of a city, and yet the servitude was one of a rural immoveable. So, too, if the servitude was one which affected something built or placed on the soil, as, for instance, the right to place a beam in another man's building; although this building was in the country, the servitude was one of an urban immoveable. In this paragraph and in paragraph 2, instances are given of servitudes of rural immoveables. The object of the servitude *iter* was the right of passing across land on foot or horseback: *iter est qua quis pedes vel eques commeare potest.* (D. viii. 3. 12.) That of the servitude *actus* was the right of driving animals or vehicles across land: *qui actum habet et plaustrum ducere et jumenta agere potest.* (D. viii. 3. 7. pr.) That of the servitude *via* was the right of using the road in any way whatever, as, for instance, of dragging stones or timber over it, which he could not do if he had only the *actus* (D. viii. 3. 7. pr.); and of having the road, in the absence of special agreement, of the width provided by the law of the Twelve Tables, that is, eight feet where it ran straight, and sixteen feet where it wound round to change its direction: *viæ latitudo ex lege Duodecim Tabularum in porrectum octo pedes habet; in anfractum, id est, ubi flexum est, sedecim.* (D. viii. 3. 8.) Of course the larger of these rights comprehended the smaller; if a person had the right of driving over land, he had the right of passing over it. A special agreement might indeed be made to the contrary; a person might, for instance, grant the right of driving beasts, but insist that the way should never be used except when beasts were driven.

1. Prædiorum urbanorum sunt servitutes, quæ ædificiis inhærent, ideo urbanorum prædiorum dictæ, quoniam ædificia omnia urbana prædia appellantur, etsi in villa ædificata sunt. Item prædiorum urbanorum servitutes sunt hæ: ut vicinus onera vicini sustineat: ut in parietem ejus liceat vicino tignum immittere: ut stillicidium vel flumen recipiat quis in ædes suas vel in

1. The servitudes of urban immoveables are those which appertain to buildings, and they are said to be servitudes of urban immoveables, because we term all edifices urban immoveables, although really built in the country. Among these servitudes are the following: that a person has to support the weight of the adjoining house; that a neighbour should have the right of inserting a beam into his neighbour's

aream, vel non recipiat; et ne altius tollat quis ædes suas, ne luminibus vicini officiatur.

wall; that he has to receive or not to receive the water that drops or runs from another man's house on to his building or into his court; or that he is not to raise his house higher, and thereby obstruct his neighbour's lights.

D. viii. 2. 2.

The words *quæ ædificiis inhærent* in the text, are equivalent to the *in superficie consistunt* of Paul. (D. viii. 2. 20. pr.) The servitudes attach to some building raised on the soil.

Onera vicini sustineat. By this servitude a wall or pillar of the *res serviens* was obliged to support the weight of the *res dominans.* The owner of this wall or pillar, so long as he remained owner, was bound to keep it in good repair, so as to continue to support the weight safely. (D. viii. 5. 6. 2). This was the only case where the owner of the *res serviens* had to do any positive act. But the owner of the wall, into which a beam was let by the servitude *tigni immittendi,* was not compelled to repair the wall, in order that the beam might rest there safely. (D. viii. 5. 8. 2.)

It is easy to understand what is meant by the servitudes *stillicidii vel fluminis recipiendi* and *altius non tollendi.* By the one the *res serviens* was made to receive the rain-water of the *res dominans,* by the other the *res serviens* was prohibited from being raised above the *res dominans.* But in the text we have the servitude *stillicidii vel fluminis non recipiendi,* and in the passage of the Digest (viii. 2. 2.), from which much of the text is borrowed, we read of a servitude *altius tollendi;* and it is not very easy to understand what these servitudes were. Theophilus, in his paraphrase of this section, thus explains the former: *Aut tu jus hujusmodi* (i.e. *stillicidia tua in meas ædes projiciendi*) *habebas in ædes meas; et rogavi te ne stillicidia tua aut canales in domum vel aream meam projiceres.* Thus it would appear that the servitude *non recipiendi* was an extinction of a preexistent servitude *recipiendi* made in favour of the owner of the *res serviens.* So, too, the servitude *altius tollendi* is explained to mean the allowing the house of a neighbour to be built above ours; so that the neighbour who was previously under a servitude, or at any rate under an obligation, *non altius tollendi,* by the creation of what may be called a counter-servitude, does away with the impediment to his building above our house. If it was really a servitude, as we should certainly suppose from the language of Theophilus, that was extinguished or nullified by this new counter-servitude, it seems scarcely natural that this should not be given among the modes of ending a servitude, and still more, that the usual language of the jurists with respect to the extinction of a servitude should be departed from. The ordinary phrase was, that the thing affected, the *res serviens,* was freed, *res liberatur,* and it seems a very cumbrous mode of effecting the *liberatio rei* to create a new servitude, when the object would have been at once

accomplished by merely surrendering the existing servitude to the owner of the *res serviens.* The commentators are therefore driven to hold that the right previously existing, that, namely, of having our water flow into our neighbour's house, or of having our neighbour's house kept from exceeding a given height, was not a servitude, but was given by law. Positive enactments, such as we read of in TAC. *Annal.* xv. 43; SUET. *Aug.* 89; D. xxxix. 1. 1. 17, may have decided that adjoining houses should, in particular places, for the mutual advantage of the owners, be of the same level or pour off their water on to the adjoining house, while those persons who were intended to be benefited might still forego this advantage, if they pleased to allow of a servitude being created to do away with the effect of the enactment. It must, however, be confessed, that no one who reads the passages in which enactments for the regulation of buildings are mentioned, would suppose that individuals were ever allowed to infringe them by the mere permission of their neighbours. All that we can be quite sure of is that these servitudes, which were the contraries of other servitudes, were constituted for the benefit of the owner of a thing that previously had been under some disadvantage.

It is to be observed that words are sometimes used to express servitudes which seem proper to the owner of the *res dominans,* not to the owner of the *res serviens.* Thus, if the above explanation is correct, the *servitus tollendi* means the *servitus patiendi vicinum tollere* (see Bk. iv. Tit. 6. 2), and what is termed in the text, as it would seem more properly, the *servitus stillicidii recipiendi,* is termed in the Digest (viii. 2. 2) the *servitus stillicidii avertendi.*

The right of view was protected in several ways. The servitude *ne luminibus officiatur* prevented our neighbour from doing anything, whether by building, planting trees, or by any other means, whereby the light was in any way, however slightly, intercepted from our house. The servitude *ne prospectui offendatur* prevented our neighbour from doing anything that would make the view from our house less pleasant and open (D. viii. 2. 15, 17. pr.); and the *jus luminum* forced our neighbour in building a wall to leave apertures through which we could look beyond. (D. viii. 2. 4. 40.)

2. In rusticorum prædiorum servitutibus quidam computari recte putant aquæ haustum, pecoris ad aquam adpulsum, jus pascendi, calcis coquendæ, harenæ fodiendæ.

2. Some think that among servitudes of rural immoveables are rightly included the right of drawing water, of watering cattle, of feeding cattle, of burning lime, of digging sand.

D. viii. 3. 1. 1.

There are many servitudes, both of rural and of urban immoveables, mentioned in the Digest, besides those given as examples in the Institutes.

3. Ideo autem hæ servitutes prædiorum appellantur, quoniam

3. These servitudes are called the servitudes of immoveables, because

sine prædiis constitui non possunt. Nemo enim potest servitutem adquirere urbani vel rustici prædii, nisi qui habet prædium, nec quisquam debere, nisi qui habet prædium.

they cannot be constituted without immoveables. For no one can acquire a servitude of a rural or urban immoveable, unless he has an immoveable belonging to him; nor can any one owe such a servitude unless he has an immoveable belonging to him.

D. viii. 4. 1. 1.

The nature of most servitudes of urban immoveables demanded that the immoveable over which, and the immoveable in right of which, the servitude was exercised, should be contiguous; but when the servitude was one of rural immoveables, the *prædia* need not necessarily be near together. Still, however, a servitude was not permitted to exist which was useless to its owner; a person could not have a right of way, for instance, over the land of another if he was prevented from using the way by land, over which he had no servitude, lying between his land and that over which the servitude was to be exercised. (D. viii. 1. 14. 2.)

There was another difference between the servitudes of rural and urban immoveables. The latter were, for the most part, used continuously, the former only at times. The beam, for instance, always rested in the wall; there was no moment in which the owner of the *res serviens* was not prohibited from blocking up his neighbour's lights. But the way was not always being used; nor were cattle always being watered. (D. viii. 1. 14.) From this difference in their nature, there arises an important difference in the modes in which these two kinds of servitudes might be lost by not being used. A continuous servitude could be lost by non-user only when the servient owner did some act inconsistent with the existence of that servitude, and the dominant owner for a certain time acquiesced in the act or neglected to assert his rights. A discontinuous servitude, on the other hand, was lost if a certain time elapsed during which the dominant owner never did the act for the doing of which the servitude was created. (D. viii. 2. 20.)

4. Si quis velit vicino aliquod jus constituere, pactionibus atque stipulationibus id efficere debet. Potest etiam in testamento quis heredem suum damnare, ne altius ædes tollat, ne luminibus ædium vicini officiat: vel ut patiatur eum tignum in parietem immittere vel stillicidium habere: vel ut patiatur eum per fundum ire, agere aquamve ex eo ducere.

4. If any one wishes to create a right of this sort in favour of his neighbour, he must do so by agreements and stipulations. A person can also, by testament, bind his heir not to raise his house higher lest he obstruct a neighbour's lights, to permit a neighbour to insert a beam into his wall, or to receive the water from a neighbour's roof; or, again, he may oblige his heir to allow a neighbour to go across his land, or to drive beasts or vehicles, or to conduct water across it.

GAI. ii. 31; D. viii. 4. 16.

Gaius tells us (ii. 29), that *jura prædiorum rusticorum* were among *res mancipi* (see Introd. sec. 59), while *jura prædiorum*

urbanorum were not, and that the former were constituted by *mancipatio;* the latter, as well as personal servitudes, were constituted by the process termed *in jure cessio.* (See introductory note to this Book.) But these modes of constituting servitudes were only applicable to the *solum Italicum:* in the provincial lands, where there was no legal ownership at all, no ownership of servitudes could be given. But Gaius says, that if any one wished to create a servitude over provincial *prædia,* he could effect it *pactionibus et stipulationibus,* using the words of the text. The parties agreed to constitute the servitude, and this agreement (*pactio*) was generally, perhaps almost always, followed by a stipulation or solemn contract (see Introd. sec. 83), by which the person who permitted the servitude to be constituted over his *prædium,* bound himself to allow the exercise of the right, by subjecting himself to a penalty in case of refusal. (See THEOPHIL. *Paraphrase of Text.*) When the right had been once exercised, and the owner of the servitude had thus the *quasi-possessio* of the servitude, the prætor secured him in the enjoyment of his right by granting him possessory interdicts (see Introd. sec. 107, and note on introductory section of Title 6 of this Book), and also permitted him, if the servitude afterwards passed out of his *quasi-possessio,* to bring an action to claim it called the *actio Publiciana,* by which a *bona fide* possessor was allowed to represent himself fictitiously as a *dominus,* and to claim (*vindicare*) a thing as if he were the owner. (Bk. iv. Tit. 6. 4; D. vi. 2. 11. 1.) In all probability the same mode of constituting servitudes obtained also with regard to the *solum Italicum;* although there were proper and peculiar modes of constituting servitudes over *prædia Italica,* yet if an agreement and stipulation were followed by *quasi-possessio,* the prætor would protect the *quasi-possessor.* And hence it was said that servitudes were constituted *jure prætorio* and were maintained *tuitione prætoris.*

Modern writers on Roman law are much divided in opinion whether servitudes were really constituted *pactionibus atque stipulationibus,* by agreements and stipulations alone, or whether we are always to understand that, to perfect the title, what is termed *quasi-traditio* was necessary. That is, whether, as *traditio* was necessary to transfer the property in a corporeal thing, so it was necessary, in order to transfer the property in an incorporeal thing, that the person to whom it was transferred should be placed in the legal quasi-possession of his right. If the servitude was a positive one, it is very easy to see how this quasi-possession could be established; for directly the right was exercised with the *animus possidendi,* and permitted to be so exercised by the owner of the *res serviens,* the person in favour of whom the servitude was constituted would have the quasi-possession. But when the servitude was a negative one, when the owner of the *res serviens* was merely bound *not* to do something, the only evident mode by which possession could be said to be gained was, when the owner of the

Tit. IV. DE USUFRUCTU.

Ususfructus est jus alienis rebus utendifruendi salva rerum substantia. Est enim jus in corpore: quo sublato et ipsum tolli necesse est.

Usufruct is the right to use and enjoy things belonging to others, provided that the substance of the things used remains unimpaired. For it is a right over something corporeal; and if this thing perishes, the usufruct itself necessarily perishes also.

D. vii. 1. 1, 2.

We now pass to personal servitudes, those, namely, which are given to a person simply as a person, and not as the owner of a particular house or piece of land. In personal as in prædial servitudes one portion of the *dominium* is detached from the rest, but this portion is made up of many and indefinite rights, not, as in prædial servitudes, of a single and definite right. Personal servitudes also differed from real in being applicable to moveables as well as to immoveables; and the personal servitude *ususfructus* was divisible, that is, some of the fruits included in the servitude might be parted with, although the servitude *usus* was, like real servitudes, indivisible.

The person to whom the *ususfructus* was given had two rights united; he had the *jus utendi*, that is, the right of making every possible use of the thing apart from consuming it or from taking the fruits of it, as, for instance, the right of living in a house or employing beasts of burden; and he had also the *jus fruendi*, the right of taking all the fruits of the thing over which the servitude was constituted. The definition of *fructus* is *quicquid in fundo nascitur* (D. vii. 1. 59. 1), that is, the ordinary produce, but not accidental accessions or augmentations, such as a treasure found (D. xxiv. 3. 7. 12) or islands formed in a river.

He might sell, or let, or give his right of taking the fruits to another, and the profits he thence derived were termed his *fructus civiles*. (D. vii. 1. 12. 2.) It was only such of the *fructus* as were actually taken or gathered by him, or those acting under him, that belonged to him; and no fruits which were not gathered at the time of his death passed to his heir. (See Tit. 1. 36.) He was obliged to give security, on entering on the exercise of his right, that he would use his right as a good *paterfamilias*, and give up, at the time when his right expired, the possession of the thing. (D. vii. 9. 1.) We have had an instance of what was meant by using his right as a good *paterfamilias* in paragr. 38 of Tit. 1, where it is said that he is bound to replace dead sheep and dead trees. He was also bound not to alter the nature of the thing over which the right extended; he could not, for instance, build on land unbuilt on, or change the use to which land was specially destined. (D. vii. 1. 7. 1; D. vii. 1. 13. 4.) And it is with reference to this

that the words *salva rerum substantia*, in the text, are sometimes understood, so that the sentence would mean, usufruct is the right of using and taking the fruits of things belonging to another, but so as not to alter the substance. Ulpian (*Reg.* 24. 26) certainly uses the words *salva rerum substantia* in a sense very similar; but the concluding words of the section make it more natural to understand *salva rerum substantia* as referring here to the duration of the usufruct. It lasts as long as the thing over which it is constituted remains unaltered; for if the thing perishes, the usufruct perishes. The two sentences of this section are taken without alteration from the Digest, but are from different authors, the former being from Paul, the latter from Celsus. (D. vii. 1. 1, 2.) Very probably Paul did not use the words *salva rerum substantia* with reference to the duration of the servitudes; but the compilers of the Institutes saw that, if they were used in this sense, the two sentences would cohere together.

1. Ususfructus a proprietate separationem recipit idque pluribus modis accidit. Ut ecce si quis alicui usumfructum legaverit; nam heres nudam habet proprietatem, legatarius usumfructum: et contra si fundum legaverit deducto usufructu, legatarius nudam habet proprietatem, heres vero usumfructum: item alii usumfructum, alii deducto eo fundum legare potest. Sine testamento vero si quis velit alii usumfructum constituere, pactionibus et stipulationibus id efficere debet. Ne tamen in universum inutiles essent proprietates semper abscedente usufructu, placuit, certis modis extingui usumfructum et ad proprietatem reverti.

1. The usufruct may be detached from the property; and this separation takes place in many ways; for example, if the usufruct is given to any one as a legacy; for the heir has then the bare ownership, and the legatee has the usufruct; conversely, if the estate is given as a legacy, subject to the deduction of the usufruct, the legatee has the bare ownership, and the heir has the usufruct. Again, the usufruct may be given as a legacy to one person, and the land minus this usufruct may be given to another. If any one wishes to constitute a usufruct otherwise than by testament, he must effect this by pacts and stipulations. But, lest the property should be rendered wholly profitless by the usufruct being for ever detached, it has been thought right that there should be certain ways in which a usufruct may become extinguished, and be again absorbed in the property.

D. vii. 1. 6. pr.; D. xxxii. 2. 19. pr.; D. vii. 1. 3. pr. and 2; GAI. ii. 31.

Besides the other modes of constituting servitudes mentioned in the note to the fourth paragraph of the last Title we may in the case of usufructs notice that a usufruct was, at least in one instance, constituted *lege*, i.e. by express enactment. It will be found from the first paragraph of the ninth Title of this Book, that under Justinian's legislation the father acquired the use of his son's *peculium*. We see from the text that a testator gave or reserved a usufruct by the mere wording of his will. When the dealing was *inter vivos*, the transferor gave the usufruct by agreement, or else reserved it in making a *traditio* of the *nuda proprietas*.

It will be observed that, in putting the third case of gift of

usufruct by testament, that, namely, in which the usufruct is given to one legatee, the *nuda proprietas* to another, the gift to the latter is expressed by the words *deducto eo* (i.e. *usufructu*) *fundum*. The Digest (xxxiii. 2. 19) explains why the words *deducto eo* should in such a case be carefully added to a gift of the *fundus*; for if they were not, the second legatee would be treated as having the *nuda proprietas*, and also as having a joint interest in the usufruct with the first legatee.

2. Constituitur autem ususfructus non tantum in fundo et ædibus, verum etiam in servis et jumentis ceterisque rebus, exceptis his, quæ ipso usu consumuntur: nam eæ neque naturali ratione neque civili recipiunt usumfructum. Quo numero sunt vinum, oleum, frumentum, vestimenta. Quibus proxima est pecunia numerata: namque in ipso usu adsidua permutatione quodammodo extinguitur. Sed utilitatis causa senatus censuit, posse etiam earum rerum usumfructum constitui, ut tamen eo nomine heredi utiliter caveatur. Itaque si pecuniæ ususfructus legatus sit, ita datur legatario, ut ejus fiat, et legatarius satisdat heredi de tanta pecunia restituenda, si morietur aut capite minuetur. Ceteræ quoque res ita traduntur legatario, ut ejus fiant: sed æstimatis his satisdatur, ut, si morietur aut capite minuetur, tanta pecunia restituatur, quanti eæ fuerint æstimatæ. Ergo senatus non fecit quidem earum rerum usumfructum (nec enim poterat), sed per cautionem quasi usumfructum constituit.

2. A usufruct may be constituted not only of lands and buildings, but also of slaves, of beasts of burden, and everything else except things which are consumed by being used, for these are susceptible of a usufruct neither by natural nor by civil law. Among such things are wine, oil, wheat, garments; and of a like nature is coined money; for it, too, is in a manner consumed in the very use made of it, through continually passing from hand to hand. But the senate, thinking such a measure would be useful, has enacted that a usufruct even of these things may be constituted, if only sufficient security is given to the heir; and therefore if the usufruct of money is given to a legatee, the money is considered to be given to him in complete ownership; but he has to give security to the heir for the repayment of an equal sum in the event of his death or his undergoing a *capitis deminutio*. Other things, too, of the same kind are delivered to the legatee so as to become his property; but their value is estimated and security is given for the payment of the amount at which they are valued, in the event of the legatee dying or undergoing a *capitis deminutio*. The senate has not then, to speak strictly, created a usufruct of these things, for that was impossible, but, by requiring security, has established a right analogous to a usufruct.

D. vii. 1. 3. 1; D. vii. 5. 1, 2, 3, 7.

Properly only things *quæ in usu non consumuntur* could be the subject of a servitude which consisted in using things only for a time; but as things *quæ usu consumuntur*, things that perish in the using, are things that may for the most part be easily replaced by similar things of an equal quantity and quality, the *senatusconsultum* referred to in the text (the date of which is uncertain, but is probably not later than Augustus) permitted that things *quæ usu consumuntur* should be made subject to a kind of usufruct by which they might be consumed at once, and then, on an event occurring by which a real usufruct would have

expired, that is, the death or *capitis deminutio* of the usufructuary, they were to be replaced by similar things, or, what effected the same object in a different way, their pecuniary value was estimated on the commencement of the quasi-usufruct, as it is termed, and paid at its expiration. Ulpian gives the following as the terms of the *senatusconsultum : Ut omnium rerum quas in cujusque patrimonio esse constaret, ususfructus legari possit.* (D. vii. 5. 1.)

It will be observed that the text includes garments, *vestimenta*, among things of which there was only a quasi-usufruct, whereas the Digest twice speaks of them as things of which there was a real usufruct. (D. vii. 1. 15. 4; vii. 9. 9. 3.) They were, in fact, one or the other according as it was the garments or their value that was to be given to the owner of the *nuda proprietas* at the end of the usufruct, and this might depend on the intention of the parties or the nature of the materials.

Satisdatur. The usufructuary not only guaranteed by a stipulation the replacement of the things or the payment of their value, but he procured a surety (*fidejussor*) to guarantee it also. (D. vii. 5. 8.)

3. Finitur autem ususfructus morte fructuarii et duabus capitis deminutionibus, maxima et media, et non utendo per modum et tempus. Quæ omnia nostra statuit constitutio. Item finitur ususfructus, si domino proprietatis ab usufructuario cedatur (nam extraneo cedendo nihil agitur): vel ex contrario si fructuarius proprietatem rei adquisierit, quæ res consolidatio appellatur. Eo amplius constat, si ædes incendio consumptæ fuerint vel etiam terræ motu aut vitio suo corruerint, extingui usumfructum et ne areæ quidem usumfructum deberi.

3. The usufruct is terminated by the death of the usufructuary, by two kinds of *capitis deminutio*, namely, the greatest and the middle, and also by not being used according to the manner and during the time fixed; all which points have been decided by our constitution. The usufruct is also terminated if the usufructuary surrenders it to the owner of the property (a cession to a stranger would not have this effect); or, conversely, by the usufructuary acquiring the property, which is called consolidation. Again, if a building is consumed by fire, or thrown down by an earthquake, or falls through decay, the usufruct of it is necessarily extinguished, nor does there remain any usufruct due even of the soil on which it stood.

C. iii. 33. 16. pr. and 1, 2; Gai. ii. 30.

The text points out five ways in which the usufruct would terminate. 1. By the death or *capitis deminutio* of the usufructuary. If the usufruct belonged to a city or corporation which could not die, it lasted for a hundred years, as being the extreme length of the duration of human life. (D. vii. 1. 56.) Previously to Justinian the *minima capitis deminutio* extinguished a usufruct (Paul. *Sent.* iii. 6. 29), because the person who underwent it was not the same person in the eyes of the law after undergoing it as he was before; he commenced a new existence. Justinian altered the law in this respect (C. iii. 33. 16), and he also decided

a question which had divided the jurists, whether a usufruct acquired by a slave or a *filiusfamilias* terminated on the death of the slave, or death or *capitis deminutio* of the son, or whether it remained for the benefit of the master or father. He decided that it should remain until the master's or father's natural or civil death, and further, that in the case of a *filiusfamilias*, it should also continue for his benefit after his father's death; so that the father had the usufruct for his life, and then the son, if he survived the father, had it for his life. (C. iii. 33. 16, 17.)

2. *Non utendo per modum et tempus.* Secondly, the usufructuary might lose the usufruct by not using it in the way agreed on by the parties during the time fixed by law. The usufructuary might, for instance, have the use of a *fundus* for the summer, and if he used it only during the winter he would not use the usufruct of the *fundus* in the way it was given him, and this was equivalent to not using it at all; and if he did not exercise his right at any period previous to the time fixed by law as that when the usufruct became extinct by non-usage, his right was gone. This time was, under the old law, one year when the usufruct affected moveables, and two years when the usufruct affected immoveables. If this period elapsed without the right being exercised, the owner of the *nuda proprietas* gained the usufruct by usucapion. Justinian altered this by fixing three years as the time for moveables, and ten or twenty years for immoveables, according as the person affected was present or absent. (See Tit. 6. 1.) The usufructuary was placed so far in the position of an owner of a thing, that it required the same length of time to make him lose the usufruct as it did to make the owner lose the property. Hence it is said in the Code (iii. 33. 16. 1) that he was not to lose the usufruct unless *talis exceptio* (i.e. of usucapion) *usufructuario opponatur, quæ etiam si dominium vindicaret posset eum præsentem vel absentem excludere.*

Non-usage and *capitis deminutio* only affected rights already commenced; and in order to avoid their effects the usufruct was often given by legacy *in singulos annos, vel menses, vel dies.* As a new usufruct thus began each year, month, or day, there could be no non-usage for a longer time than the duration of each usufruct, and *capitis deminutio* only affected the usufruct existing at the time it was undergone. (D. vii. 4. 1. 3, 28.)

3. *Si domino cedatur.* Thirdly, usufruct was lost if it was surrendered to the owner of the *nuda proprietas.* The word *cedere* belongs, in the corresponding passage of Gaius, to the *in jure cessio*, the fictitious suit by which personal servitudes were given up in the time of Gaius. This mode of giving up servitudes to the *dominus* being obsolete, less technical words would be more appropriate in the text. The usufructuary could not transfer the usufruct to another, because the usufruct attached to him personally, and was to terminate by his death or *capitis deminutio*, and not by that of a stranger. He could allow another to exercise his right

of taking the fruits until he himself died or lost the servitude, but this did not make that person the owner of the usufruct.

4, 5. The two other modes by which a usufruct might be lost, viz. (4) *consolidatio*, when the usufruct was extinguished, *quia res sua nemini servit*, and (5) the thing being consumed, that is, either really perishing, or having its *substantia* altered, need no explanation.

Of course, if a usufruct was made conditionally, or for a limited time, it expired when the condition was accomplished or the time ended.

Apart from the modes of extinction by death and *capitis deminutio* peculiar to *ususfructus* and *usus*, servitudes generally were, in the time of Justinian, extinguished in much the same way as the particular servitude of usufruct, viz.: 1. By the destruction of the thing—the *res dominans* or the *res serviens*. 2. By the owner of the *res serviens* becoming owner of the *res dominans*, or, in case of personal servitudes, by the usufructuary or usuary acquiring the remainder of the *proprietas*. 3. By the surrender of the servitude to the owner of the *res dominans* either by agreement or by permitting something that destroys the servitude. (D. viii. 6. 8.) 4. By the expiration of the period during which the duration of the servitude has been limited by the creator. 5. Lastly by non-usage, there being, however, a remarkable difference in this respect between servitudes *rusticorum prædiorum* and servitudes *urbanorum prædiorum*; for as the possession of the former was not continuous, that is, the right was not always being exercised, the mere non-usage of the right during the time fixed by law extinguished it; but as the possession of the servitudes *urbanorum prædiorum* was continuous, it was necessary that the owner of the *res serviens* should do something to break the possession, or, as it was termed by the jurists, *usucapere libertatem* (D. viii. 2. 6), i.e. to commence the liberation of the *res serviens*, as, for instance, to turn a *stillicidium* away from his premises; and if this was acquiesced in during the time fixed by law, that is two years before Justinian, and, after the changes introduced by Justinian, ten or twenty years according as the parties were or were not in the same province, the owner of the *res dominans* could not afterwards claim his servitude.

4. Cum autem finitus fuerit usus fructus, revertitur scilicet ad proprietatem et ex eo tempore nudæ proprietatis dominus incipit plenam habere in re potestatem.

4. When the usufruct is ended, it reverts to the property; and the person who had the bare ownership begins thenceforth to have full power over the thing.

Some texts have *finitus fuerit totus ususfructus*; for as the usufruct was divisible, portions of it might exist, and yet other portions have reverted to the owner of the *nuda proprietas*. It may be remarked that if two persons had a joint interest in the same usufruct, and the usufruct was divided between them, when

one died, his snare went, not to the owner of the *nuda proprietas*, but to his co-proprietor: *inter fructuarios est jus accrescendi.* (D. vii. 2. 1. pr.)

Tit. V. DE USU ET HABITATIONE.

Iisdem istis modis, quibus ususfructus constituitur, etiam nudus usus constitui solet, iisdemque illis modis finitur, quibus et ususfructus desinit.

A naked use is constituted in the same ways as the usufruct; and is terminated in the same ways in which the usufruct also ceases.

D. vii. 1. 3. 3.

The use was a portion of the usufruct. The person to whom this right was given could use the thing, but not take any of its fruits. He had the *nudus usus* (D. vii. 8. 1), the bare use of the thing, and enjoyed all the advantages he could obtain from the use; but he could avail himself of nothing which the thing produced. He could not, like the usufructuary, let, sell, or give the exercise of his right, for he was excluded from taking what were termed *fructus civiles*, as much as from taking *fructus naturales.* The jurists, however, modified in some degree the rigour of this principle; and the owner of the use was allowed, in cases where the right would otherwise have produced no benefit whatever, or where it seemed right to put a favourable interpretation on the wording of a testament, to take as much of certain kinds of produce as was sufficient for his daily wants.

1. Minus autem scilicet juris in usu est quam in usufructu. Namque is, qui fundi nudum usum habet, nihil ulterius habere intellegetur, quam ut oleribus, pomis, floribus, feno, stramentis, lignis ad usum cottidianum utatur: in eoque fundo hactenus ei morari licet, ut neque domino fundi molestus sit neque his, per quos opera rustica fiunt, impedimento sit: nec ulli alii jus, quod habet, aut vendere aut locare aut gratis concedere potest, cum is, qui usumfructum habet, potest hæc omnia facere.

1. But, of course, the right of use is less extensive than that of usufruct; for he who has the naked use of lands, is not understood to have anything more than the right of taking herbs, fruit, flowers, hay, straw, and wood, sufficient for his daily supply. He is permitted to establish himself upon the land, so long as he neither annoys the owner nor hinders those who are engaged in the cultivation of the soil. He cannot sell, or let, or give gratuitously his right to another, while a usufructuary may do all these things.

D. vii. 8. 10. 4; D. vii. 8. 12. 1; D. vii. 8. 11.

The jurists differed as to the *fructus* of which a certain daily supply might be taken, and as to whether it was necessary that they should be consumed on the spot. (D. vii. 8. 10. 1; D. vii. 8. 12. 1; D. vii. 8. 15.) The station of the *usuarius* and the abundance of the fruits would make a difference in particular cases.

The *usuarius* could prevent the owner as well as any one else from coming on land subject to a *usus*, except for the purpose of cultivating it.

Aut gratis concedere. There would be a sort of *fructus* in being able to gratify the wish of giving and of conferring a favour, instead of receiving a price.

2. Item is, qui ædium usum habet, hactenus juris habere intellegitur, ut ipse tantum habitet, nec hoc jus ad alium transferre potest: et vix receptum videtur, ut hospitem ei recipere liceat et cum uxore sua liberisque suis, item libertis nec non aliis liberis personis, quibus non minus quam servis utitur, habitandi jus habeat et convenienter, si ad mulierem usus ædium pertineat, cume marito habitare ei liceat.

2. He who has the use of a house, has a right over it to the extent of inhabiting it himself; he cannot transfer this right to another; and it is not without hesitation that it has been thought allowable that he should receive a guest in the house, and live in it with his wife and children, and freedmen, and other free persons who may be attached to his service no less than his slaves are; and that a wife, in the same way, if it is she who has the use of a house, may live in it with her husband.

D. vii. 8. 2. 1; D. vii. 8. 4, 6, 8.

The *usuarius* had the use of the whole thing, and the owner could not make use of any part not used by the *usuarius*. (D. vii. 8. 22. 1.) So, too, the right of *usus* was indivisible, and could not be given in detached portions, as that of usufruct could be, to different persons. (D. vii. 8. 19.) But one person could have the use, and another the usufruct of the same thing. (D. vii. 8. 14. 3.)

The doubt expressed in the text had long ago been set at rest, and it was settled that the wife or the husband might use the thing of which the use was given to the other. (D. vii. 8. 4. 1; D. vii. 8. 9.)

3. Item is, ad quem servi usus pertinet, ipse tantum operis atque ministerio ejus uti potest: ad alium vero nullo modo jus suum transferre ei concessum est. Idem scilicet juris est et in jumento.

3. So, too, he who has the use of a slave, has only the right of himself using the labour and services of the slave: for he is not permitted in any way to transfer his right to another. And it is the same with regard to beasts of burden.

D. vii. 8. 12. 5, 6.

4. Sed si pecoris vel ovium usus legatus fuerit, neque lacte neque agnis neque lana utetur usuarius, quia ea in fructu sunt. Plane ad stercorandum agrum suum pecoribus uti potest.

4. If the use of cattle or sheep is given as a legacy, the person who has the use cannot take the milk, the lambs, or the wool, for these are among the fruits. But he may certainly make use of the animals to manure his land.

D. vii. 8. 12. 2.

As a flock was hardly of any use if a person might not take any of the *fructus*, the *usuarius* was allowed to have a little milk (*modicum lac*) when the *usus* had been constituted in a way to admit of a favourable interpretation. (D. vii. 8. 12. 2.)

5. Sed si cui habitatio legata sive aliquo modo constituta sit, neque usus videtur neque ususfructus, sed quasi proprium aliquod jus. Quam habitationem habentibus propter rerum utilitatem secundum Marcelli sententiam nostra decisione promulgata permisimus non solum in ea degere, sed etiam aliis locare.

5. But if the right of habitation is given to any one, either as a legacy or in any other way, this does not seem a use or a usufruct, but a right that stands as it were by itself. From a regard to what is useful, and conformably to an opinion of Marcellus, we have published a decision, by which we have permitted those who have this right of habitation, not only themselves to inhabit the place over which the right extends, but also to let to others the right of inhabiting it.

D. vii. 8. 10. pr.; C. iii. 33.

The jurists had doubted whether *habitatio* was to be considered a distinct servitude (D. vii. 8. 10. pr.), which Justinian here pronounces it to be. So far as it differed from the use, or, after Justinian gave the power of letting the house, from the usufruct, of the house, it perhaps differed by being an occupation allowed as a fact rather than as a right, if this is the meaning of Modestinus when, in speaking of a legacy of *habitatio* given *in singulos annos aut menses*, he says, *potius in facto quam in jure consistit.* (D. iv. 5. 10.) It did not cease by non-usage or by *capitis deminutio.* (D. vii. 8. 10. pr.)

6. Hæc de servitutibus et usufructu et usu et habitatione dixisse sufficiat. De hereditate autem et de obligationibus suis locis proponemus. Exposuimus summatim, quibus modis jure gentium res adquiruntur: modo videamus, quibus modis legitimo et civili jure adquiruntur.

6. Let it suffice to have said thus much concerning servitudes, usufruct, use, and habitation. We shall treat of inheritances and obligations in their proper places. We have already briefly explained how things are acquired by the law of nations; let us now examine how they are acquired by statute and the civil law.

Before quitting the subject of servitudes it is proper to observe that, besides the possessory interdicts by which the possession of servitudes was secured, there were two real actions by which a claim was made with regard to a servitude. By the one (*actio in rem confessoria*), the owner of the servitude claimed to have his servitude protected, and the right to it pronounced to be his, against any one who attempted to disturb him in his quasi-possession, or disputed his right. By the other (*actio in rem negatoria*), the owner of a thing over which another person claimed or exercised a servitude himself claimed to have this thing pronounced free from the servitude. It might seem as if this was rather a defence to an action for the servitude than itself a real action. But it was considered a substantive and independent action, because the owner of the *dominium* thereby vindicated his claim to a portion of it, namely, to the servitude which it was attempted to detach from the ownership. (See Book iv. Tit. 6. 2.)

Justinian now returns to the examination of the modes in which things are acquired, and the sixth Title would **properly**

follow the latter part of the first. Before, however, we leave the subject of *jura in rem* falling short of ownership, we must notice three other kinds of such *jura in rem* besides servitudes, of which the Institutes here make no mention. These are the *jus emphyteuticarium*, the *jus superficiarium*, and the *jus pignoris*.

The exact time when servitudes first became a part of Roman law is not easy to discover. The Twelve Tables determine the width of a way, but there is nothing to show that this was intended to regulate the width of a way to which one person had a right over the land of another. However, the nature of servitudes makes it almost certain that they must have very early been recognised by law; and, at any rate, we learn that they were so long before the end of the Republic. The period at which the three *jura in rem*, which we have just named, were established as a part of law, can be ascertained more readily. The first, the *jus emphyteuticarium*, though based on an institution of the civil law, yet only assumed its peculiar character in the time of the Lower Empire; the two others owed their existence to the prætors.

The *jus emphyteuticarium*, or, as it is more generally called, *emphyteusis* (see Book iii. Tit. 24. 3), was the right of enjoying all the fruits, and disposing at pleasure, of the *prædium* of another, subject to the payment of a yearly rent (*pensio*, or *canon*) to the owner. Formerly the lands of the Roman people, of municipalities, or the college of priests, used to be let for different terms of years, sometimes for a short term, such as that of five years, sometimes for a term amounting almost to a perpetuity, under the name of *agri vectigales*. (GAI. iii. 145.) Afterwards, not only the lands but also the houses of private individuals were let in a similar manner, and these lands and houses so let were termed *prædia emphyteuticaria* (C. xi. 58. 61), a name arising from there being a new ownership, or what almost amounted to an ownership, engrafted (ἐν, φυτεύω) on the real *dominium*. Alongside this new tenure still continued the letting by the state of *agri vectigales*. Either shortly before, or in the time of Justinian, the two rights, that relating to the *agri vectigales*, and that of *emphyteusis*, were united under the common name of *emphyteusis*, and subjected to particular regulations.

Both lands and buildings could be subject to *emphyteusis*. (Nov. vii. 3. 1. 2.) The *emphyteuta*, as the person who enjoyed the right was termed, besides enjoying all the rights of a usufructuary, could dispose of the thing, or rather of his rights over it, in any way he pleased (Nov. vii. 3. 2), except that the *dominus* had a right of pre-emption; or, if he did not exercise this right, he had a fine on the transfer of not more than 2 per cent. on the purchase-money. (C. iv. 66. 3.) The *emphyteuta* could create a servitude over the thing or mortgage it (D. xiii. 7. 16. 2); he had a real action (which, however, was said to be a *utilis vindicatio*, because he was not the owner, but only in the place of one) to defend or assert

his rights; and at his death his right was transmitted to his heirs. (Nov. vii. 3.) He was obliged to pay his *pensio* under any circumstances, whether he actually benefited by his *emphyteusis* or not, and could be expelled if the *pensio* was three years in arrear. (C. iv. 66. 1.) He was also bound to use the thing over which his right extended, so that it was not deteriorated in value at the time his right expired. (Nov. vii. 3. 2.)

The right of *superficies* was almost identical with that of *emphyteusis*, but applied only to the *superficies*, that is, things built on the ground, not to the ground itself. It was the right of disposing freely of a building erected on another man's soil without destroying it, subject to the payment of a yearly rent. (D. vi. 1. 74.) It must have been the creation of the *jus prætorium* at a time when there was nothing like the *emphyteusis* of buildings, and when it was only lands that were let as *agri vectigales*. The rights and duties of the *superficiarius*, the person who enjoyed the right, may be gathered from those of the *emphyteuta*.

The *jus pignoris* was the right given to a creditor over a thing belonging to another, in order to secure the payment of a debt. When the thing over which the right was given passed into the possession of the creditor, the right of the creditor was expressed by the word *pignus;* when the thing remained in the hands of the debtor, the right of the creditor was expressed by *hypotheca*. Sometimes only one or more particular things were under a *hypotheca*, sometimes all the property of the debtor. The right of the creditor extended only to the amount of his debt, but all the thing pledged was subject to his claim. The right might be created by the mere agreement of the parties, without any handing over or tradition of the thing pledged to the creditor. (C. viii. 17. 2. 9.) Sometimes the right was created by a magistrate, who gave execution to a creditor by this means; and in many cases the law created what was called *hypotheca tacita* over the property, as, for instance, over the property of a tutor, in favour of the pupil, and over the property of a husband, that the *dos* of the wife might be restored.

The creditor had the right (1) of selling (D. xx. 5) or pledging (C. viii. 24) the thing pledged; (2) of satisfying his own claim before that of any one else out of the proceeds of the sale, or of the money obtained by pledging the thing; (3) of having himself constituted owner of the thing if no purchaser could be found for it. The creditor could not be deprived even by agreement of his power of sale. Justinian enacted that, unless the parties otherwise agreed, the sale should take place not sooner than two years after notice to pay, and in two years more, if no purchaser could be found, the creditor could be declared the owner. (Tit. 8. 1 note.) (4) Of bringing a real action (termed the *actio quasi-Serviana*) against any third person who unlawfully detained the thing pledged to him, or, if he had only a *hypotheca*, against the borrower to put him in possession of the thing pledged. (Bk. iv. Tit. 6. 7.)

If the same thing was pledged to different creditors, the one to whom it was first pledged had generally a preference, *potior tempore, potior jure*. But there were certain *hypothecæ* which had special privileges attached to them, and which had a first claim on the property of the debtor, such as the *hypotheca* of the *fiscus* or imperial treasury for the payment of taxes (C. iv. 46. 1), and that of a wife for her *dos* (Bk. iv. Tit. 6. 29; C. viii. 14. 12); and *hypothecæ* which were created by an instrument signed by three substantial witnesses had a preference over others by a constitution of Leo. (C. viii. 18. 11.)

Gaius speaks of an older form of giving pledge, the *contractus fiduciæ*, by which the full property in the thing pledged was made over to the creditor by *mancipatio* or *in jure cessio*, the debtor being entitled to a reconveyance if he paid the debt; but this was obsolete in the time of Justinian. (GAI. ii. 59, 60.)

TIT. VI. DE USUCAPIONIBUS ET LONGI TEMPORIS POSSESSIONIBUS.

Jure civili constitutum fuerat, ut, qui bona fide ab eo, qui dominus non erat, cum crediderit, eum dominum esse, rem emerit vel ex donatione aliave qua justa causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum in Italico solo usucapiat, ne rerum dominia in incerto essent. Et cum hoc placitum erat, putantibus antiquioribus, dominis sufficere ad inquirendas res suas præfata tempora, nobis melior sententia resedit, ne domini maturius suis rebus defraudentur neque certo loco beneficium hoc concludatur. Et ideo constitutionem super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium usucapiantur, immobiles vero per longi temporis possessionem, id est inter præsentes decennio, inter absentes viginti annis usucapiantur et his modis non solum in Italia, sed in omni terra, quæ nostro imperio gubernatur, dominium rerum justa causa possessionis præcedente adquiratur.

By the civil law it was provided that if any one by purchase, gift, or any other legal means, had *bona fide* received a thing from a person who was not the owner, but whom he thought to be so, he should acquire this thing by use if he held it for one year, if it was a moveable, wherever it might be, or for two years, if it was an immoveable, but this only if it was in the *solum Italicum;* the object of this provision being to prevent the ownership of things remaining in uncertainty. Such was the decision of the ancients, who thought the times we have mentioned sufficient for owners to inquire after their property; but we have come to a much better decision from a wish to prevent owners being despoiled of their property too quickly, and to prevent the benefit of this mode of acquisition being confined to any particular locality. We have accordingly published a constitution providing that moveables shall be acquired by a use extending for three years, but immoveables by the 'possession of long time,' that is, ten years for persons present, and twenty for persons absent; and that by these means, provided a just cause of possession precede, the ownership of things may be acquired, not only in Italy, but in every country subject to our empire.

GAI. ii. 42-44; D. xli. 3. 1; C. vii. 35.

The subject of *possessio* is only treated indirectly in the Institutes, and it is necessary to have a general conception of the meaning of the term before proceeding to examine the mode of acquiring property called usucapion.

By *possessio* is meant primarily mere detention, i.e. the physical apprehension of a thing. If the possessor adds the intention (*animus*) of holding the thing as his own and of exercising over it all the rights of an owner, then he has legal possession of it as opposed to the mere physical possession involved in a simple detention. When a person had legal possession of a thing, he was protected in his possession against any one who had not a better title to possess, and in order to protect him the prætor granted him an interdict. If his possession was not founded on force or fraud, and had been acquired by a legal mode of acquisition, then it ripened, after a length of time laid down by law, into full ownership, and the process by which the change was effected was termed *usucapio*. Thus the meaning of the term legal or juristical possession, the protection of the rights of the possessor by interdicts, and the transmutation under certain circumstances of *possessio* into ownership by the lapse of time, are the three main points on which attention has to be fixed in examining the subject of *possessio*.

The two requisites of legal possession are briefly summed up in the words *detentio* and *animus*. The detention of a corporeal thing means such a holding of it as enables the person detaining to deal with the thing at his pleasure. Thus a person who enters on part of a piece of land has detention of the whole because it is at his pleasure to go to any part of it. A person who has the key of a granary has the means of going into the granary. The *animus* means the intention of the possessor to hold the thing possessed as his own, and not as a borrower holds the thing, for the latter holds it avowedly as belonging to another (*alieno nomine*).

When a person was in possession of a thing physically, but without the *animus possidendi*, as a borrower would be of the thing lent, he was said not to possess it, but to be in possession of it, *non possidet, est tantum in possessione* (D. xli. 2. 10); and a person merely in possession was not protected by interdicts. The Roman jurists contrast natural with civil possession, and in natural possession they include the two cases of a possessor not possessing *bona fide* and *ex justa causa* and a person *in possessione*, while by civil possession they mean such a possession as was capable of transmutation by usucapion, that is, was *bona fide* and *ex justa causa*.

The edict fixed certain cases in which the prætor would himself at once give a decision and pronounce what was to be done without sending the case to be examined by a *judex*, and the order of the prætor thus given was called an interdict. (See Bk. iv. Tit. 15.) What was termed an *interdictum retinendæ possessionis* was granted to a person whose possession had been disturbed or threatened with disturbance, and an *interdictum recuperandæ*

possessionis was granted to a person who had been forcibly ejected from his possession. Whenever a person possessed a thing as a matter of fact, with the intention of treating it as if he was the owner, that is, as if it belonged to him, the possessor had a right to the interdicts that protected his possession. But it was only when the possession was *bona fide* and *ex justa causa* that the operation of usucapion would transmute his possession into ownership: that is, the possessor must have commenced his possession, thinking he had a real right to possess, and have acquired it by a recognised legal method of acquiring property. A *possessio* which was commenced under these circumstances was changed into *dominium* by lapse of time, and the time required, as fixed by the law of the Twelve Tables, was two years if the thing possessed was an immoveable, and one year if it was a moveable. The operation of usucapion was of the greatest importance in the system of Roman law. Things that being *res mancipi* ought to have been conveyed by mancipation, but had been conveyed without the necessary ceremony, were not legally passed in ownership to the person to whom they were nominally conveyed. But the very short time requisite for the operation of usucapion quickly changed the possession into *dominium*, and thus ended the separation of the legal and beneficial interests. And, generally, when the prætor gave the possession of property where he could not by strict law give the ownership, that is, when he exercised his equitable jurisdiction, the operation of usucapion soon converted the *possessor bonorum* into the full legal *dominus*.

In order that the ownership of a thing should be acquired by usucapion, it was of course necessary that the thing itself should be susceptible of being held *in dominio*. There was no ownership possible, for instance, in the case of the *solum provinciale*, and, therefore, no usucapion. The emperor or the people were owners of the soil, and the actual occupier of land in the provinces could not be the owner; he could only be protected in the possession of it; and the prætors protected his possession against the claim of any one asserting himself to be the rightful possessor, by permitting the possessor, when he had held the land for ten years, if he and the claimant had during that time inhabited the same province (*inter præsentes*), or when he had held it for twenty years, if they had not (*inter absentes*), to repel the action by an exception, which, as being placed at the beginning of the *intentio*, was termed a *præscriptio* (see Introd. sec. 104), and would probably be in this form: *Ea res agatur, cujus non est longi temporis possessio;* and this prescription or exception (for the terms may be used indifferently, as it was only in the early times of the construction of the *formula* that such a defence was really placed at the beginning of the *intentio*), if found to be true in fact, made the possessor quite secure.

This prescription, however, had not exactly the same effect as usucapion. In the first place, it did not make the person owner

of the immoveable, for nothing could do that with respect to the *solum provinciale*. Secondly, if an action was brought by the real owner, the usucapion was not interrupted until judgment had been given against the possessor (D. xli. 4. 2. 21); whereas, if an action was brought against the possessor of an immoveable in the *solum provinciale*, the *præscriptio longi temporis* was of no avail unless the time required had expired before the proceeding had reached that stage termed the *litis contestatio*. (See Introd. sec. 105.) Lastly, the effect of the *præscriptio longi temporis* was in one way more favourable to the possessor than that of usucapion; for the person who acquired a thing by usucapion acquired it with all its liabilities and charges; whereas the *præscriptio longi temporis* was a good plea to the action of a person who claimed to have a right over the thing, as, for instance, a right of servitude or mortgage, which he had not asserted while the time was running, so that the possessor who could use this plea had the thing he possessed quite free from any liability or charge anterior to the commencement of his possession. (D. xli. 3. 44. 5; D. xliv. 3. 12.)

In the time of Justinian all difference between the *solum Italicum* and the *solum provinciale* was done away. The text furnishes us with a brief statement of the change made in the effect of possession. Under Justinian possession during three years (called, however, usucapion in this case—see paragr. 12 of this Title) gave the ownership of moveables; possession during ten years if the parties were present, or twenty if they were absent, gave the ownership of immoveables. Thus the length of possession no longer afforded merely a means of repelling an action, but conferred the *dominium*, although the word *præscriptio* was used to express the process. (See Tit. 9. 5 of this Book.)

1. Sed aliquando etiamsi maxime quis bona fide rem possederit, non tamen illi usucapio ullo tempore procedit, veluti si quis liberum hominem vel rem sacram vel religiosam vel servum fugitivum possideat.

1. Sometimes, however, although the thing is possessed with perfect good faith, yet usucapion does not operate by any length of time; as, for instance, when the possession is of a free person, a thing sacred or religious, or a fugitive slave.

GAI. ii. 45. 48.

The Institutes now proceed to speak of the exceptions to the rule of acquisition by use. These exceptions arise from two sources: either the thing which we have possessed is in its nature incapable of being acquired by use, or there is something in the mode in which it has come into our possession which prevents length of possession having its ordinary effect.

As a general rule, no incorporeal thing could be acquired by usucapion, *incorporales res traditionem et usucapionem non recipere manifestum est* (D. xli. 1. 43); but see as to servitudes Tit. 3. 4 note, and as to inheritances note to paragr. 10 of this Title.

The fugitive slave could not be acquired by use, because

he was considered to have robbed his master of his interest in him by his flight, *sui furtum facere intellegitur*. (D. xlvii. 2. 60.)

2. Furtivæ quoque res et quæ vi possessæ sunt, nec si prædicto longo tempore bona fide possessæ fuerint usucapi possunt: nam furtivarum rerum lex duodecim tabularum et lex Atinia inhibet usucapionem, vi possessarum lex Julia et Plautia.

2. Things stolen or seized by violence, cannot be acquired by use, although they have been possessed *bona fide* during the length of time above prescribed; for usucapion is prevented as to things stolen, by the law of the Twelve Tables, and by the *lex Atinia*; as to things seized by violence, by the *lex Julia et Plautia*.

GAI. ii. 45; D. xli. 3. 4. 6.

The *lex Atinia* was a *plebiscitum* named after its proposer Atinius Labeo, B.C. 197. The *lex Plautia*, proposed by M. Plautius, was passed B.C. 89. We know nothing of the *lex Julia* here mentioned except that its name makes it probable that it was passed in the time of Augustus; it may possibly be the *lex Julia de vi publica seu privata* referred to in Book iv. Tit. 18. 8.

3. Quod autem dictum est furtivarum et vi possessarum rerum usucapionem per legem prohibitam esse, non eo pertinet, ut ne ipse fur quive per vim possidet, usucapere possit: nam his alia ratione usucapio non competit, quia scilicet mala fide possident: sed ne ullus alius, quamvis ab eis bona fide emerit vel ex alia causa acceperit, usucapiendi jus habeat. Unde in rebus mobilibus non facile procedit, ut bonæ fidei possessori usucapio competat. Nam qui alienam rem vendidit vel ex alia causa tradidit, furtum ejus committit.

3. When, however, it is said that the usucapion of things stolen or seized by violence is prohibited by these laws, it is not meant that the thief himself, or he who possesses himself of the thing by violence, is unable to acquire the property by use, for another reason prevents them, namely, that their possession is *mala fide*; but that no one else, although he has in good faith purchased, or taken in any way from them, is able to acquire the property by use. Whence, as to moveables, it does not often happen that a *bona fide* possessor gains the property in them by use. For whenever any one has sold, or made over on any other title, a thing belonging to another, he commits a theft of it.

GAI. ii. 49, 50.

The *vitium furti* remained indefinitely attached to the *res* until it came back into the hands of the owner or until he knew where it was. (D. xlvii. 2. 20 and l. 16. 215.)

In the case of moveables everything sold or delivered over by a person who knew himself not to be the owner was considered stolen, and therefore could not be acquired by use; and it could not often happen that a person who was not the real owner could sell or deliver a moveable, thinking himself to be the owner.

4. Sed tamen id aliquando aliter se habet. Nam si heres, rem defuncto commodatam aut locatam vel apud eum depositam existimans hereditariam esse, bona fide accipienti vendiderit aut donaverit aut dotis nomine dederit, quin is, qui acceperit, usucapere possit, dubium non est, quippe

4. Sometimes, however, it is otherwise; for, if an heir, supposing a thing lent or let to the deceased, or deposited with him, to be a part of the inheritance, sells or gives it as a gift or *dos* to a person who receives it *bona fide*, there is no doubt that the person receiving it may acquire the property in it by

ea res in furti vitium non ceciderit, cum utique heres, qui bona fide tamquam suam alienaverit, furtum non committit.

use; for the thing is not tainted with the vice of theft, as the heir who has *bona fide* alienated it as his own, has certainly not been guilty of a theft.

GAI. ii. 50.

5. Item si is, ad quem ancillæ ususfructus pertinet, partum suum esse credens vendiderit aut donaverit, furtum non committit: furtum enim sine affectu furandi non committitur.

5. So if the usufructuary of a female slave sells or gives away her child, believing it to be his property, he does not commit theft; for theft is not committed without the intention of thieving.

GAI. ii. 50.

In such a case the usufructuary would make a legal mistake, but would not act with a criminal intention. (Tit. 1. 37.)

6. Aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur.

6. It may also happen in various other ways, that a man may transfer a thing belonging to another without the vice of theft tainting the thing, so that the possessor acquires the property in it by use.

GAI. ii. 50.

As, for instance, if a person who was not heir thought that he was, and sold a thing which was part of the inheritance (D. xli. 3. 36. 1); or if a person took possession of a thing which he believed the owner had intended to abandon (D. xli. 7. 4).

7. Quod autem ad eas res, quæ solo continentur, expeditius procedit: ut si quis loci vacantis possessionem propter absentiam aut neglegentiam domini, aut quia sine successore decesserit, sine vi nanciscatur. Qui quamvis ipse mala fide possidet, quia intellegit, se alienum fundum occupasse, tamen, si alii bona fide accipienti tradiderit, poterit ei longa possessione res adquiri, quia neque furtivum neque vi possessum accepit; abolita est enim quorundam veterum sententia existimantium, etiam fundi locive furtum fieri, et eorum, qui res soli possident, principalibus constitutionibus prospicitur, ne cui longa et indubitata possessio auferri debeat.

7. But as to things appertaining to the soil, usucapion operates more readily; as if a person without violence takes possession of a place vacant by the absence or negligence of the owner, or by his having died without a successor; for, although his possession is *mala fide*, since he knows that he has seized on land not belonging to him, yet if he transfers it to a person who receives it *bona fide*, this person will acquire the property in it by long possession, as the thing he receives has neither been stolen nor seized by violence. The opinion of the ancients, who thought that there could be a theft of a piece of land or a place, is now abandoned, and there are imperial constitutions which provide that no possessor of an immoveable shall be deprived of a long and undoubted possession.

GAI. ii. 51; C. vii. 33. 1, 2.

If things immoveable could have been stolen, as was the opinion of Sabinus (AUL. GELL. xi. 18), the acquisition of immoveables by length of possession would have been as difficult as

that of moveables; but as the *bona fides* of the actual possessor cured the *mala fides* of the first person who began the possession, it might very well happen that the property in immoveables should be gained in this way. By Novel 119 (cap. 7), A.D. 542, Justinian altered this, and only allowed the title by possession during ten or twenty years where the true owner was aware of his right, and of the transfer to the *bona fide* possessor; otherwise the right of ownership was not gained until after a possession of thirty years.

8. Aliquando etiam furtiva vel vi possessa res usucapi potest: veluti si in domini potestatem reversa fuerit; tunc enim, vitio rei purgato, procedit ejus usucapio.

8. Sometimes even a thing stolen or possessed by violence may be acquired by use; for instance, if it has come back into the power of its owner, for then, the taint being purged, the acquisition by use may take place.

D. xli. 3. 4. 6.

In order that a thing once stolen should, after again falling under the power of its owner, be capable of being acquired by a *bona fide* possessor, it was necessary that the owner of the thing should recover it as a thing belonging to himself. If he purchased it not knowing that it belonged to him, the vice or taint of theft was not purged. (D. xli. 3. 4. 12.)

9. Res fisci nostri usucapi non potest. Sed Papinianus scripsit, bonis vacantibus fisco nondum nuntiatis, bona fide emptorem sibi traditam rem ex his bonis usucapere posse: et ita divus Pius et divi Severus et Antoninus rescripserunt.

9. Things belonging to our *fiscus* cannot be acquired by use. But Papinian has given his opinion that if, before *bona vacantia* have been reported to the *fiscus*, a *bona fide* purchaser receives any of them, he can acquire the property in them by use. And the Emperor Antoninus Pius, and the Emperors Severus and Antoninus, have issued rescripts in accordance with this opinion.

D. xli. 3. 18.

Bona vacantia was the term used to express the property of persons who died without successors. These goods belonged to the *fiscus* on being reported by the officers of the treasury (D. xlix. 14. 1. 1), but up to that time they could be acquired by usucapion.

10. Novissime sciendum est, rem talem esse debere, ut in se non habeat vitium, ut a bona fide emptore usucapi possit vel qui ex alia justa causa possidet.

10. Lastly, it is to be observed that a thing must be such as to have no taint of vice in itself, in order that the *bona fide* purchaser or person who possesses it under any other legal title may acquire it by use.

D. xli. 3. 24.

The word 'vice,' as used here with reference to acquisition by use, includes every obstacle that prevented a thing being of a kind to be acquired by length of possession. The first requisite

of civil possession, of possession, that is, capable of ripening into ownership by usucapion, was that the thing possessed should not have any vice in it, should not be of a kind which could not be acquired by usucapion. To the instances of such things given above in paragraphs 1, 2, and 9, may be added things forming part of a *dos*, unless the term of usucapion had begun to run before the marriage. (D. xxiii. 5. 16; C. v. 12. 30.) Secondly, it was necessary that the thing should be possessed *ex justa causa*. By this it was meant that it must have come into the power of the possessor by a means, such as sale or gift, which was recognised by law as a good foundation for the transfer of ownership. It might have so come, and yet no title be acquired to the ownership, except by usucapion: the person who transferred it might not have been the real owner; or the person who received it might not have had a right to do so.

The Digest (xli. 2. 3. 21; xli. 4. *et seq.*) gives a long series of Titles in which the several *justæ causæ* of possession are examined separately, and the different characters in which a person possessed are treated of. Thus, a person might possess *pro emptore*, as having bought the thing; *pro donato*, as having received it as a gift; *pro dote*, as having received it as a *dos; pro soluto*, as the payment of a debt; *pro derelicto*, as having taken it when abandoned by its owner. In any of these cases the person who sold, gave, or abandoned the thing, might not have been the real owner, and then the possessor could only acquire the property in the thing by use. Or again, he might possess *pro legato*, and then if he was not the person to whom the legacy had really been left, or if the legacy had been revoked, he might acquire by use the property in the thing. In this case it was not the testator's not being the proprietor that made the possessor not the true owner, but it was the latter's having no right to have the possession of the thing. Again, he might possess a thing *pro suo*, a general term specially employed to denote the possession of *fructus* gathered *bona fide*, or that of *res nullius*, such as wild animals. If he took possession of an animal, naturally wild, which had been tamed, and possessed it *pro suo*, he did not at once acquire the property in it, because it was not of a nature, since it had ceased to be wild, to be acquired by mere possession, but he became the owner by use. (D. xli. 10. 1, 2; D. xli. 2. 3. 21.)

Thirdly, it was necessary that there should be *bona fides;* the possessor must be quite ignorant of that which there was faulty in the manner he had gained possession. No ignorance of a leading principle of law, such as that a person below the age of puberty could not alienate his goods (D. xxii. 6. 4.; D. xli. 3. 31. pr.), nor any wilful ignorance of facts, would be permitted as the commencement of usucapion. (D. xxii. 6. 6.) But if a person was only ignorant of a fact, of which it was excusable he should be ignorant, as that a vendor was under full age, his possession was *bona fide*. (D. xli. 4. 2. 15.) If the property of a pupil or minor had been

gained by another person by *usucapio*, the prætor would allow the usucapion to be rescinded on good reason being shown, but the mere fact that the usucaptor had been mistaken as to the age was not a sufficient reason. In the case of sale it was necessary that this *bona fides* should exist at the moment of the contract being made, and also at that of its being performed (D. xli. 3. 48), and in every case it was necessary it should exist at the commencement of possession. But after the possession was once commenced *bona fide*, a subsequent knowledge of the real facts did not vitiate the possession. Gaius notices three exceptional cases where a *mala fide* possessor might acquire by usucapion. Inheritances at one time, though incorporeal things, could be acquired by usucapion, although it was afterwards held that only the component parts could be so acquired; and as the Twelve Tables had said that things of the soil should be acquired in two years, and other things (*ceteras res*) in one, and the inheritance was not a thing of the soil, it was held that the inheritance or any part could be acquired in a year—the reason being, says Gaius, that the law wished to hurry heirs to enter on inheritances in order that the sacred rites might be performed, and creditors satisfied; so that if a man held anything, even land, forming part of an inheritance, for one year only, he acquired it by usucapion, although he knew it was part of the inheritance, and he was thus acting *mala fide*. (GAI. ii. 52-58.) But this kind of usucapion was made ineffectual in the time of Hadrian. (GAI. ii. 57.) Secondly, if a thing was given over by one man to another to hold for him *fiduciæ causa*, was, e.g., deposited with him or pledged to him, the original owner, if he got possession of the thing, could re-acquire it by usucapion in a year, even if it was an immoveable (GAI. ii. 59); but if it was pledged the new possession could not thus operate if it had been obtained by the request of the original owner. (GAI. ii. 60.) Thirdly, the owner of a thing mortgaged to the state and sold for non-payment of the mortgage debt could re-acquire it by usucapion against the *prædiator* or purchaser from the state; but if it was an immoveable two years' possession was necessary. (GAI. ii. 61.)

11. Error autem falsæ causæ usucapionem non parit. Veluti si quis cum non emerit, emisse se existimans possideat: vel cum ei donatum non fuerat, quasi ex donatione possideat.

11. But if a mistake is made as to the title of possession, and it is wrongly supposed to be just, there is no usucapion. As, for instance, if any one possesses in the belief that he has bought, when he has not bought, or that he has received a gift, when no gift has really been made to him.

D. xli. 3. 27.

Supposing a person who thought that he had acquired *ex justa causa* had not, supposing, for instance, he thought a person intended to give him a thing who did not, or if he had received a thing in payment of a debt, while really no debt was recognised,

the question naturally suggested itself whether the imperfection in the possession could be cured by *bona fides*, that is, an honest belief that the *causa* was *justa*, that a gift had been made, or that a debt was recognised. The question had been much debated by the jurists, and Justinian here decides it by declaring that the imperfection could not be so cured, and that if the possessor had been mistaken in this respect, length of possession would not profit him. But this doctrine is not consistent with that of the Digest, which treats a plausible error (an error into which a man might naturally and reasonably have fallen with regard to the *causa*) as permitting usucapion to take place. We learn, for example, from the Digest, that where it was with respect to an act of some one through whom the possessor believed his title to have been gained, and whom he reasonably believed to have been acting for him as his procurator, that the mistake was made, the possessor could acquire by use, although this person might not have acted as the possessor supposed. (D. xli. 4. 11.)

12. Diutina possessio, quæ prodesse cœperat defuncto, et heredi et bonorum possessori continuatur, licet ipse sciat, prædium alienum: quodsi ille initium justum non habuit, heredi et bonorum possessori, licet ignoranti, possessio non prodest. Quod nostra constitutio similiter et in usucapionibus observari constituit, ut tempora continuentur.

12. Long possession, which has begun to reckon in favour of the deceased, is continued in favour of the heir or *bonorum possessor*, although he may know that the immoveable belongs to another person; but if the deceased commenced his possession *mala fide*, the possession does not profit the heir or *bonorum possessor*, although ignorant of this. And our constitution has enacted the same with respect to usucapions, so that the times of possession by different persons may be reckoned as running through.

D. xli. 4. 2. 19; D. xliv. 3. 11; C. vii. 31.

Persons who possessed *pro herede* or *pro possessore*, that is, as *bonorum possessores*, did not themselves begin a new usucapion, but continued the *persona* of the deceased, and were placed in the same position with reference to anything which he had possessed, as if he had himself continued to possess it. If, for example, the deceased had possessed the thing *pro emptore* or *pro donato*, the *heres* or *bonorum possessor* continued to possess it in the same way, and added to the time of his possession the time during which the deceased had possessed it.

Similiter in usucapionibus, i.e. the continuation of possession by the heir or *bonorum possessor*, shall apply to the usucapion of moveables by three years' possession.

13. Inter venditorem quoque et emptorem conjungi tempora, divi Severus et Antoninus rescripserunt.

13. Between the buyer and the seller, too, the Emperors Severus and Antoninus have decided by rescript that their several times of possession shall be reckoned together.

D. xli. 4. 2. 20.

Persons who were merely successors of others in holding particular things by sale, gift, legacy, &c., did not of course continue the possession, for they did not continue the person, of their predecessor. But if both the possession of their predecessor, and their own, were such as to give rise to usucapion, the times of the two possessions were added together. If there was something to prevent this in the possession of their predecessors, their own possession was the first commencement of the usucapion.

The interruption of usucapion was termed *usurpatio*. (D. xli. 3. 2.) It might take place in various ways. The thing itself might be taken away from the possessor, or, if it was an immoveable, he might be expelled from it (D. xli. 3. 5); or it might become impossible, from physical causes, such as an inroad of the sea, to occupy it (D. xli. 2. 3. 17); or, again, the possessor might fall into the power of the enemy, and he would not be reinstated in his possession by *postliminium*, for possession was a fact, and as he had ceased to possess, as a matter of fact, he could only begin a new possession by again possessing the thing (D. xlix. 15. 12. 2); or the interruption might be what was termed civil, that is, be produced by an action to contest the right, and with respect to this Justinian (C. vii. 33. 10) made the time of the first raising of the controversy (*mota controversia*) the period of interruption, instead of the *litis contestatio* (see Introd. sec. 105), which had no place in the civil process of his time.

There was also a prescription or possession, termed *longissimi temporis*. If there was a possession for thirty years, or, in the case of ecclesiastical property, or hypothecated property in possession of the debtor, for forty years, whatever *vitium* or obstacle there might be to the acquisition by use, for instance, theft, violence, absence of *justa causa*, or *mala fides*, the possessor could repel actions brought to claim the thing. (C. vii. 39; Nov. 117.)

14. Edicto divi Marci cavetur, eum, qui a fisco rem alienam emit, si post venditionem quinquennium præterierit, posse dominum rei per exceptionem repellere. Constitutio autem divæ memoriæ Zenonis bene prospexit his, qui a fisco per venditionem vel donationem vel alium titulum aliquid accipiunt, ut ipsi quidem securi statim fiant et victores existant, sive conveniantur sive experiantur: adversus sacratissimum autem ærarium usque ad quadriennium liceat intendere his, qui pro dominio vel hypotheca earum rerum, quæ alienatæ sunt, putaverint sibi quasdam competere actiones. Nostra autem divina constitutio, quam nuper promulgavimus, etiam de his, qui a nostra vel venerabilis Augustæ

14. It is provided by an edict of the Emperor Marcus, that a person who has purchased from the *fiscus* a thing belonging to another person, may repel the owner of the thing by an exception, if five years have elapsed since the sale. But a constitution of Zeno of sacred memory has completely protected those who receive anything from the *fiscus* by sale, gift, or any other title, by providing that they themselves are to be at once secure, and made certain of success, whether they sue or are themselves sued, in an action. While they who think that they have a ground of action as owners or mortgagees of the things alienated, may bring an action against the sacred treasury within four years. An imperial constitution, which we ourselves

domo aliquid acceperint, hæc statuit, quæ in fiscalibus alienationibus præfata Zenoniana constitutione continentur.

have recently published, extends to those who have received as a gift anything from our palace, or that of the empress, the provisions of the constitution of Zeno relative to the alienations of the *fiscus*.

C. vii. 37.

As Theophilus points out, the privilege really conceded by the constitution of Marcus Aurelius was, that no possession, if the thing had been received from the *fiscus*, should be attacked after five years had elapsed, however otherwise open to attack. If not otherwise open to attack, the time of usucapion, being so much shorter than five years, would, previously to the changes of Justinian, have given the property before the time fixed by the constitution had arrived.

TIT. VII. DE DONATIONIBUS.

Est etiam aliud genus adquisitionis, donatio. Donationum autem duo genera sunt: mortis causa et non mortis causa.

There is, again, another mode of acquiring property, donation, of which there are two kinds, donation *mortis causa*, and donation not *mortis causa*.

D. l. 16. 67. 1.

The phrase *dono dare* was appropriated in Roman law to the mode of transferring property by gift; *dare* signifying that the whole property in the thing was passed by delivery, and *dono* expressing the motive from which the delivery was made. (See *Vat. Fragm.* 275. 281. 283.) Viewed strictly, gift is not a peculiar mode of acquisition, but an acquisition by delivery with a particular motive for the transfer. Possibly it was on account of the solemnities with which, under Justinian, gifts had to be made that the authors of the Institutes treat gift as a separate mode of acquisition.

1. Mortis causa donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accepit: sin autem supervixisset, qui donavit, reciperet, vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit. Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia. Nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere

1. A donation *mortis causa* is that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. These donations *mortis causa* are now placed, in all respects, on the footing of legacies. It was much doubted by the jurists whether they ought to be considered as a gift or as a

legatis connumeretur: et sic procedat, quemadmodum eam nostra formavit constitutio. Et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donatur, magisque eum, cui donat, quam heredem suum. Sic et apud Homerum Telemachus donat Piræo:

Πείραι' (οὐ γάρ τ' ἴδμεν, ὅπως ἔσται τάδε ἔργα)·
Εἴ κεν ἐμὲ μνηστῆρες ἀγήνορες ἐν μεγάροισι
Λάθρῃ κτείναντες, πατρώια πάντα δάσωνται,
Αὐτὸν ἔχοντά σε βούλομ' ἐπαυρέμεν, ἤ τινα τῶνδε·
Εἰ δέ κ' ἐγὼ τούτοισι φόνον καὶ κῆρα φυτεύσω,
Δὴ τότε μοι χαίροντι φέρειν πρὸς δώματα χαίρων.

legacy, partaking as they did in some respects of the nature of both; and some were of opinion that they belonged to the one head, and others that they belonged to the other. We have decided by a constitution that they shall be in almost every respect reckoned amongst legacies, and shall be made in accordance with the forms our constitution provides. In short, it is a donation *mortis causa*, when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir. It is thus that, in Homer, Telemachus gives to Piræus:—

'Piræus, for we know not how these things shall be, if the proud suitors shall secretly slay me in the palace, and shall divide the goods of my father, I would that thou thyself shouldst have and enjoy these things rather than that any of those men should; but if I shall plant slaughter and death amongst those men, then indeed bear these things to my home, and joying give them to me in my joy'.

D. xxxix. 6. 35. 2, 4; D. xxxix. 6. 37. pr.; C. viii. 57. 4.

There are two essential conditions of a *donatio mortis causa:* it must be made with the view of meeting the case of death; and it must be made to take effect only if death occurs, and so as to be revocable at any time previous, and to fail if the recipient died before the giver. The donor might, at his pleasure, alter the character of the gift, making it irrevocable; but then the gift was regarded as, and had the same legal consequences as, an ordinary *donatio*. (D. xxxix. 6. 27.)

It might be made conditional upon death in two ways. The donor might say, 'I hand you over my horse, but the gift is only to be complete if I die in this enterprise'; or he might say, 'I give you my horse, if I survive this enterprise you are to give it me back'. In the latter method, the delivery of the thing is made at once, subject to a conditional redelivery; in the former, the delivery is made conditional. (D. xxxix. 6. 2, 29.) The donation might also be sometimes made conditional upon the death of a third person, as if a father promised to give to his daughter-in-law in case of the death of his son. (D. xxxix. 6. 11.) All who could make a testament could make a valid *donatio mortis causa;* and all who could receive under a testament could accept one. (D. xxxix. 6. 9 and 15.) Every kind of thing could be given in this way. (D. xxxix. 6. 18. 2.) Justinian, in the constitution referred to in the text, required that a *donatio mortis causa* should be made in the presence of five witnesses. (C. viii. 57. 4.)

If the gift was made in the first of the two ways above men-

tioned, although there was delivery, yet the thing was only acquired on the death of the donor, and the donor not having ceased to be *dominus* could therefore, if he revoked the gift, bring a real action to reclaim the thing handed over. If the gift was made in the second way, the whole property passed at once by the tradition to the recipient; and as, in the older and stricter law, the *dominium* passed absolutely when it passed at all, the property in the thing could not revert to the donor merely by the condition having been accomplished. He would only have a personal action against the recipient to compel him to give the value of the thing if he did not choose to give back the thing itself. The later jurists seem, however, to consider that the *dominium* reverted *ipso jure*, and that the donor could bring a real action for the thing itself. (D. xxxix. 6. 29.)

If the donor was insolvent at the time of his death, this was considered as an implied revocation of the gift. (D. xxxix. 6. 17.)

Ad exemplum legatorum redactæ sunt per omnia . . . per omnia fere legatis connumeretur—the latter is the more correct expression; gifts *mortis causa* were not exactly on the footing of legacies. For (1) they had complete effect immediately on the death of the donor, whereas legacies, to take effect, required that the heir should first enter on the inheritance. (D. xxxix. 6. 29.) (2) The rules as to capacity of taking were the same in both cases, but regard was had to the capacity to receive of the person to whom the gift was made, only at the time of the death, and not, as in the case of legacies, also at the time of the disposition. (D. xxxix. 6. 22.) (3) A *filiusfamilias*, who could not before Justinian give anything but his *peculium castrense* by testament, could, with his father's permission, make a *donatio mortis causa* of other things. (D. xxxix. 6. 25. 1.) (4) A *peregrinus* could make a *mortis causa donatio*, though he could not give a legacy. (D. xxxix. 6. 25.) There was one remarkable mode in which they were placed on the footing of legacies. By a constitution of Severus the heir was permitted to retain as large a portion (one fourth) of the gift as he could of a legacy by the *lex Falcidia*. (See C. viii. 57. 2.)

The lines quoted in the text are from Odyssey xvii. 78.

2. Aliæ autem donationes sunt, quæ sine ulla mortis cogitatione fiunt, quas inter vivos appellamus. Quæ omnino non comparantur legatis: quæ si fuerint perfectæ, temere revocari non possunt. Perficiuntur autem, cum donator suam voluntatem scriptis aut sine scriptis manifestaverit: et ad exemplum venditionis nostra constitutio eas etiam in se habere necessitatem traditionis voluit, ut, et si non tradantur, habeant plenissimum et perfectum robur et traditionis necessitas incumbat donatori. Et cum retro principum dispositiones insinuari eas

2. The other kind of donations are those which are made without any consideration of death, and are called donations *inter vivos*. They cannot, in any respect, be compared to legacies, and if completed cannot be revoked at pleasure. They are completed when the donor has manifested his intention, whether by writing or not. Our constitution has declared that, after the example of sales, they shall involve the necessity of tradition; but so that even if there be no tradition they shall be completely effectual, and place the donor under the necessity of making tradition. Previous imperial

actis intervenientibus volebant, si majores ducentorum fuerant solidorum, nostra constitutio et quantitatem usque ad quingentos solidos ampliavit, quam stare et sine insinuatione statuit, et quasdam donationes invenit, quæ penitus insinuationem fieri minime desiderant, sed in se plenissimam habent firmitatem. Alia insuper multa ad uberiorem exitum donationum invenimus, quæ omnia ex nostris constitutionibus, quas super his posuimus, colligenda sunt. Sciendum tamen est, quod, etsi plenissimæ sint donationes, tamen si ingrati existant homines, in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam præstavimus certis ex causis eas revocare, ne, qui suas res in alios contulerunt, ab his quandam patiantur injuriam vel jacturam, secundum enumeratos in nostra constitutione modos.

constitutions have enacted that they should be registered by public deeds, if exceeding two hundred *solidi*, but our constitution has raised the limit to five hundred *solidi*, so that for a gift up to this sum registration is not necessary. We have also marked out certain donations which need no registration at all, but are completely valid of themselves. We have, too, made many other new enactments, in order to extend and secure the effect of donations, all which may be collected from the constitutions we have promulgated on this subject. It must, however, be observed, that however absolutely a donation may be given, yet, if the object of the donor's bounty prove ungrateful, it is permitted by our constitution, in certain specified cases, to revoke the donation; so that they who have given their property to others should not suffer from them injuries or losses of such a kind as those enumerated in our constitution.

C. viii. 54. 35. 5; C. viii. 54. 34. pr. 3, 4; C. viii. 54. 36. pr. 2 and 3; C. viii. 56. 10.

A thing given was, if a *res mancipi*, given by mancipation, or *in jure cessio*, and, if a *res nec mancipi*, by tradition. But a mere agreement to give gratuitously (*pactum*) was not in the old law binding on the person who agreed to give, and, to make a promise to give binding, it was necessary that the agreement should assume the form of a stipulation. (See Introd. sec. 83.)

The *lex Cincia*, B.C. 193, introduced several new rules into the law respecting gifts, prohibiting gifts beyond a certain amount, excepting to near relatives, but did not make a mere agreement to give in any degree valid. The first step taken in this direction was by Antoninus Pius, who declared that in gifts *inter parentes et liberos* a mere agreement, if perfectly clear in its terms, should be binding. (Cod. Theod. viii. 12. 4.) Constantine required that the agreement should be reduced to writing and registered, and that the property should be handed over in the presence of witnesses. (Cod. Theod. viii. 12. 1, 3.) And Justinian (C. viii. 54. 35. 5) made the agreement binding, whether reduced to writing or not; but it is to be observed that he provided, not that the property should pass by the agreement, but that the donor should be bound thereby to make tradition of the thing. So that the property in the thing was acquired by tradition, and not by donation as a distinct mode of acquisition.

Donations not registered were only void for the sum by which they exceeded the amount fixed by law. (C. viii. 54. 34. 1.) Those valid without registration at all were such as donations made by, or to, the emperor to redeem captives, or to rebuild edifices destroyed by fire. (C. viii. 54. 36.)

Gifts *inter vivos* were revocable in certain cases specified in the Code (viii. 56. 10), as, for instance, when the person benefited seriously injured, or attempted to injure, the person or property of the donor, or failed to fulfil the conditions of the gift. Revocation in such cases was personal to the donor and to the receiver, and could not be exacted by the heirs of the one, or against the heirs of the other.

3. Est et aliud genus inter vivos donationum, quod veteribus quidem prudentibus penitus erat incognitum, postea autem a junioribus divis principibus introductum est, quod ante nuptias vocabatur et tacitam in se condicionem habebat, ut tunc ratum esset, cum matrimonium fuerit insecutum : ideoque ante nuptias appellabatur, quod ante matrimonium efficiebatur et nunquam post nuptias celebratas talis donatio procedebat. Sed primus quidem divus Justinus, pater noster, cum augeri dotes et post nuptias fuerat permissum, si quid tale evenit, etiam ante nuptias donationem augeri et constante matrimonio sua constitutione permisit: sed tamen nomen inconveniens remanebat, cum ante nuptias quidem vocabatur, post nuptias autem tale accipiebat incrementum. Sed nos plenissimo fini tradere sanctiones cupientes et consequentia nomina rebus esse studentes, constituimus, ut tales donationes non augeantur tantum, sed et constante matrimonio initium accipiant et non ante nuptias, sed propter nuptias vocentur et dotibus in hoc exæquentur, ut, quemadmodum dotes et constante matrimonio non solum augentur, sed etiam fiunt, ita et istæ donationes, quæ propter nuptias introductæ sunt, non solum antecedant matrimonium, sed etiam eo contracto et augeantur et constituantur.

3. There is another kind of donation *inter vivos* entirely unknown to the ancient lawyers, and subsequently introduced by the more recent emperors. It was termed the *donatio ante nuptias*, and was made under a tacit condition that it should only take effect when the marriage had followed on it. Hence it was called *ante nuptias*, because it preceded the marriage, and never took place after its celebration; but as it was permitted that *dotes* should be increased even after marriage, the Emperor Justin, our father, was the first to permit, by his constitution, that in case the *dos* was increased, the donation *ante nuptias* might be increased also, even during the marriage; but the donation still retained what was thus an improper name, and was called *ante nuptias*, while this increase was made to it after marriage. Wishing, therefore, to perfect the law on the subject, and to make names appropriate to things, we have enacted that such donations may not only be increased, but may also be first made during marriage, and that they shall be termed, not *ante nuptias*, but *propter nuptias*, and that they shall be placed on the footing of *dotes*, so far that, as *dotes* may be not only increased but first made during marriage, so donations *propter nuptias* may not only precede marriage, but, even after the tie of marriage has been formed, may be increased or made.

C. v. 3. 19, 20.

When the wife passed *in manum viri*, all that she had belonged to her husband; when she did not, all her property belonged exclusively to herself, and gifts between husband and wife, with a few exceptions (ULP. *Reg.* vii. 1), were strictly prohibited by law. But, as a provision for the expenses of marriage, the *dos* was contributed before or after marriage (and sometimes increased afterwards) by the wife or by a paternal ascendant or some one else for her. In case the *dos* was contributed by a paternal ascendant (*dos profectitia*), it could, on the termination of the marriage by the

death of the wife, be reclaimed from the husband by the donor, but not by his heirs. If it was given for her benefit by any one else than such an ascendant (*dos adventitia*), it could not be reclaimed by the donor or his heirs unless there had been a special agreement that it should be reclaimable, in which case it was termed *dos receptitia* (D. xxiii. 3. 5; ULP. *Reg.* 6. 5); but Justinian enacted that the *dos adventitia* should go to the heirs of the wife unless a special agreement to the contrary had been made. (C. v. 13. 1. 6, 13.) Thus under Justinian the surviving husband in every case lost the *dos*. If the wife survived the husband, and was *sui juris*, the *dos*, however derived, belonged to her, unless a provision to the contrary had been made by the donor. If she was still in the power of her father, she and he had to join in claiming it. (D. xxiv. 3. 2. 1.) If the *dos* consisted of things that could be replaced by others of the same kind (*res fungibiles*) (D. xxiii. 3. 42), the things given belonged in full property to the husband, and he had to return like things to the same amount within three years (altered to one year by Justinian, Cod. v. 13. 1. 7) after the dissolution of the marriage. (ULP. *Reg.* 6. 8.) If the *dos* consisted of things which could not thus be replaced, such as land or houses, the husband was nominally the owner and managed the property, but he could only take the annual proceeds, and he had to preserve the property intact and to restore it immediately on the dissolution of the marriage. He was prevented by the *lex Julia de adulteriis et de fundo dotali*, passed in the time of Augustus, from alienating immoveable property in Italy forming part of the *dos* without the consent of the wife, or mortgaging it even with her consent; and Justinian, as we shall see in the introductory paragraph of the next Title, forbad the mortgaging or alienation of immoveables, wherever situated, forming part of the *dos* even with the wife's consent. As to the expenses of the husband in his management, see note to Book iv. Tit. 6. 37.

If the marriage was terminated not by death but divorce, the general rule was that the husband had to restore the *dos* just as he would have had to do in case of the wife's death; but if the wife was divorced for misconduct, or divorced her husband without reason given, the husband was allowed to retain at first a part and in later times the whole of the *dos*, having, however, only a life interest in it, if there were children. (C. v. 12. 24; C. Th. iii. 16. 2.)

The *donatio ante nuptias*, of which we first hear in a constitution of Theodosius and Valentinian (C. v. 17. 8. 4), which speaks of it as recognised by law, was a gift on the part of the husband as an equivalent to the *dos*. It was the property of the wife, but managed by the husband, and could not be alienated even with her consent. Justinian provided (Nov. 97. 1) that the wife, if survivor, should receive an equal value from the *donatio propter nuptias* with that which the husband, if survivor, would have received from the *dos*, the actual amount reserved for the survivor being matter of agreement between the parties. By a constitution previous to

Justinian (C. v. 14. 9), the wife had, if survivor, the same fraction of the *donatio* as her husband would have had of the *dos*. Justinian substituted an equality of value for an equality of proportion.

Justinus, the predecessor of Justinian, was his uncle and adoptive father.

4. Erat olim et alius modus civilis adquisitionis per jus adcrescendi, quod est tale: si communem servum habens aliquis cum Titio, solus libertatem ei imposuit vel vindicta vel testamento, eo casu pars ejus amittebatur et socio adcrescebat. Sed cum pessimum fuerat exemplo, et libertate servum defraudari et ex ea humanioribus quidem dominis damnum inferri, severioribus autem lucrum adcrescere: hoc quasi invidiæ plenum pio remedio per nostram constitutionem mederi necessarium duximus et invenimus viam, per quam et manumissor et socius ejus et qui libertatem accepit, nostro fruantur beneficio, libertate cum effectu procedente (cujus favore et antiquos legislatores multa et contra communes regulas statuisse manifestissimum est) et eo, qui eam imposuit, suæ liberalitatis stabilitate gaudente et socio indemni conservato pretiumque servi secundum partem dominii, quod nos definivimus, accipiente.

4. There was formerly another mode of acquiring property by the civil law, namely, that of accrual; as, if any one, having a slave in common with Titius, had himself alone enfranchised him, either by *vindicta* or by testament, his share in that slave was lost, and accrued to the joint owner. But, as it was an example of very bad tendency, that both the slave should be defrauded of his freedom, and that the more humane master should suffer loss, while the more severe master profited, we have thought it advisable to apply by our constitution a gracious remedy to what seemed so odious, and have devised means by which the manumittor, and the co-proprietor, and the freed slave may be all benefited. Freedom, to favour which ancient legislators have often most obviously violated the ordinary rules of law, shall be really gained by the slave; he who has given this freedom, shall have the delight of seeing it maintained; and his co-proprietor shall be indemnified by receiving a price for the slave, proportioned to his interest in him, according to the rates fixed in our constitution.

C. vii. 7. 1. 5.

A man could not be partly free, partly a slave. If, then, a slave was enfranchised by one co-proprietor, was he a slave or free? The old law, as the text informs us, pronounced him the former. If the enfranchisement, however, was such that, according to the rules given in Bk. i. Tit. 5. 3, the enfranchised slave would have become only a *Latinus Junianus* or a *dediticius*, the enfranchisement had no effect at all, and the slave remained the slave, as before, of both. But if the enfranchisement had been such that he would have been a Roman citizen, the interest of the master who manumitted him accrued to the other proprietor. (PAUL. *Sent.* iv. 12. 1.)

The scale of prices to be paid by the manumittor to the co-proprietor is given in the Code (vii. 7. 1. 5).

TIT. VIII. QUIBUS ALIENARE LICET VEL NON.

Accidit aliquando, ut qui dominus sit, alienare non possit et contra qui dominus non sit, alienandæ rei

Sometimes it happens that he who is owner of a thing cannot alienate it, while, on the contrary, he who is not

potestatem habeat. Nam dotale prædium maritus invita muliere per legem Juliam prohibetur alienare, quamvis ipsius sit, dotis causa ei datum. Quod nos, legem Juliam corrigentes, in meliorem statum deduximus. Cum enim lex in soli tantummodo rebus locum habebat, quæ Italicæ fuerant, et alienationes inhibebat, quæ invita muliere fiebant, hypothecas autem earum etiam volente: utrisque remedium imposuimus, ut etiam in eas res, quæ in provinciali solo positæ sunt, interdicta fiat alienatio vel obligatio et neutrum eorum neque consentientibus mulieribus procedat, ne sexus muliebris fragilitas in perniciem substantiæ earum converteretur.

owner has the power of alienation. Thus, the husband is prohibited by the *lex Julia* from alienating immoveables, which form part of the *dos*, against the wish of the wife, although these immoveables, having been given him as a part of the *dos*, belong to him. We have amended the *lex Julia* and introduced a great improvement. This law only applied to Italian immoveables, and it prohibited alienations made against the wishes of the wife, and mortgages made even with her consent. Wishing to amend the law on each of these points, we have declared that the prohibition of alienation or mortgage shall extend to immoveables in the provinces, and that neither alienation nor mortgage shall be made even with the consent of the wife, lest the weakness of the female sex should be abused to the detriment of their fortunes.

GAI. ii. 62, 63; C. v. 13. 15.

The power of alienating belongs to the owner and to him only; and every owner can alienate the thing belonging to him. There are, however, exceptions to the rule, and these exceptions form the subject of this Title.

The subject of *dotes* has been already discussed in the note to paragr. 3 of the last Title.

1. Contra autem creditor pignus ex pactione, quamvis ejus ea res non sit, alienare potest. Sed hoc forsitan ideo videtur fieri, quod voluntate debitoris intellegitur pignus alienare, qui ab initio contractus pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur. Sed ne creditores jus suum persequi impedirentur neque debitores temere suarum rerum dominium amittere videantur, nostra constitutione consultum est et certus modus impositus est, per quem pignorum distractio possit procedere, cujus tenore utrique parti creditorum et debitorum satis abundeque provisum est.

1. On the other hand, a creditor may, according to agreement, alienate a pledge, although the thing is not his own property. But this alienation may perhaps be considered as taking place by the intention of the debtor, who in making the contract has agreed that the creditor might sell the thing pledged, if the debt was not paid. But that creditors might not be impeded in the pursuit of their rights, nor debtors seem too easily deprived of their property, a provision has been made by our constitution establishing a fixed method of procedure for the sale of pledges, by which the respective interests of the creditor and debtor have been fully secured.

GAI. ii. 64; C. viii. 34. 3. pr. *et seq.*

The power of a creditor to sell the thing pledged, forming an exception to the rule that none but the owner could alienate, was so necessary a part of his rights that it could not be taken from him even by express agreement; and an agreement *ne vendere liceat* had no other effect than to make it necessary for the creditor to give the debtor fuller notice of his intention to sell. (D. xiii. 7.

4-6.) Justinian, by his constitution, permitted the parties to fix the time, and place, and manner of sale at their pleasure, and it was only if there was no special agreement that the regulations of his constitution were to take effect, the gist of which was that the thing might be sold after two years had elapsed from the time when the creditor gave the debtor notice to pay, and that after two more years the creditor, if no purchaser could be found, would on petition to the emperor be declared the owner, the debtor having a further period of two years within which he might redeem. (C. viii. 34. 3.)

Tutors and curators might, in certain cases, alienate the goods of their pupils and of those committed to their care; but, at any rate in the later times of law, they had to obtain the permission of a magistrate for the alienation of rural immoveables. (See C. v. 37. 22.)

2. Nunc admonendi sumus, neque pupillum neque pupillam ullam rem sine tutoris auctoritate alienare posse. Ideoque si mutuam pecuniam alicui sine tutoris auctoritate dederit, non contrahit obligationem, quia pecuniam non facit accipientis, ideoque vindicari nummi possunt, sicubi extent: sed si nummi, quos mutuos dedit, ab eo, qui accepit, bona fide consumpti sunt, condici possunt, si mala fide, ad exhibendum de his agi potest. At ex contrario omnes res pupillo et pupillæ sine tutoris auctoritate recte dari possunt. Ideoque si debitor pupillo solvat, necessaria est tutoris auctoritas: alioquin non liberabitur. Sed etiam hoc evidentissima ratione statutum est in constitutione, quam ad Cæsareenses advocatos ex suggestione Triboniani, viri eminentissimi, quæstoris sacri palatii nostri, promulgavimus, qua dispositum est, ita licere tutori vel curatori debitorem pupillarem solvere, ut prius sententia judicialis sine omni damno celebrata hoc permittat. Quo subsecuto, si et judex pronuntiaverit et debitor solverit, sequatur hujusmodi solutionem plenissima securitas. Sin autem aliter quam disposuimus solutio facta fuerit et pecuniam salvam habeat pupillus aut ex ea locupletior sit et adhuc eandem summam pecuniæ petat, per exceptionem doli mali summoveri poterit: quodsi aut male consumpserit aut furto amiserit, nihil proderit debitori doli mali exceptio, sed nihilo minus damnabitur, quia temere sine tutoris auc-

2. It must next be observed, that no pupil of either sex can alienate anything without the authority of a tutor. If, therefore, a pupil, without the tutor's authority, lends any one money, the pupil does not contract an obligation; for he does not make the money the property of the receiver, and the pieces of money may be claimed by vindication, if they still exist. But supposing these pieces which the pupil has lent are consumed by the borrower, then, if they are so *bona fide*, a personal action may be brought: if *mala fide*, an action *ad exhibendum*. On the contrary, the pupil of either sex may acquire anything whatsoever without the authority of the tutor; and therefore when a debtor pays a pupil, the debtor must have the authority of the tutor, or he does not free himself from the debt. And we have, for very obvious reasons, declared by a constitution, published to the advocates of Cæsarea on the suggestion of the very eminent Tribonian, quæstor of our sacred palace, that the debtor of a pupil may make payment to the tutor or curator, first receiving permission by the sentence of a judge, obtained free of all expenses; and if these forms are observed, a payment made according to the sentence of the judge will give the debtor the most complete security. But if payment is made not according to the mode we have sanctioned, the pupil who has the money still safe in his possession, or has been made richer by it, may, if he demands again the same sum, be repelled by an ex-

toritate et non secundum nostram dispositionem solverit. Sed ex diverso pupilli vel pupillæ solvere sine tutore auctore non possunt, quia id, quod solvunt, non fit accipientis, cum scilicet nullius rei alienatio eis sine tutoris auctoritate concessa est.

ception of *dolus malus*. But if he has spent the money uselessly, or lost it by theft, the debtor cannot profit by the exception of *dolus malus*, and he will be condemned to pay over again, because he has paid in a rash manner, without the authority of the tutor, and has not conformed to our rules. On the other hand, pupils of either sex cannot pay without the authority of the tutor, because that which they pay does not thereby become the property of the person who receives it, as they are incapable of alienating anything without the authority of the tutor.

GAI. ii. 80. 82-84; C. v. 37. 25; D. xlvi. 3. 14. 8.

The pupil might make his condition better, but not worse. (See Bk. i. Tit. 21.) He could not transfer the property in anything belonging to him, but he could acquire the property in anything transferred to him. Three illustrations of this doctrine are given. 1. The pupil could not lend anything under the contract called *mutuum*, the essence of which was that the thing lent became the property of the borrower, who bound himself to give back a thing of equal value. (See Bk. iii. Tit. 14. pr.) If the pupil attempted to lend a thing in this way, the thing lent could be recovered by vindication, if it was possible that the actual thing should be restored; if not, its value could be recovered by a personal action (*condictio*) against the borrower; or if the borrower had been guilty of *mala fides*, an *actio ad exhibendum* would lie, that is, the borrower was called upon to produce the thing borrowed; and on his being found unable to do so, he was condemned to pay not only the value of the thing, but damages to compensate for the injury inflicted.

2. If the pupil was a debtor and paid without authorisation money to a creditor, he could not transfer the property in the pieces of money paid, and had a real action to get them back, if the creditor still had them; if not, the pupil had the same remedies as just stated in regard to a *mutuum*, except that if he brought a *condictio* against a creditor, who had *bona fide* spent the money, and the creditor could claim the same amount of money for the debt due to him, the Roman jurists considered that instead of these cross actions the debt of the pupil ought to be considered to be extinguished.

3. If the debtor made a payment to the pupil without the authorisation of the tutor, that which he paid became the property of the pupil; and as the pupil could not make his condition worse, he could not extinguish debts due to him; and thus the debt was still owing, although the pupil retained what was paid him. The debtor might still be sued for what he owed, and he could only repel the action by a plea of *dolus malus* to the extent to which

the pupil then had the money paid in hand, so that if the pupil had spent it all the debtor would have to pay over again. (GAI. ii. 84.) If the tutor authorised the payment, the debt was extinguished; but still the creditor was not quite safe; the pupil had a right to receive from the tutor the money paid; and if he could not obtain it from him, the prætor would, under certain circumstances, grant a *restitutio in integrum* (see note on introductory paragraph of Bk. i. Tit. 23), and the creditor might then be obliged to pay over again, in order that the pupil might be kept free from all loss. It was to guard against this that Justinian, in the constitution alluded to in the text, provided a means whereby the creditor should have *plenissima securitas*.

TIT. IX. PER QUAS PERSONAS NOBIS ADQUIRITUR.

Adquiritur nobis non solum per nosmet ipsos, sed etiam per eos, quos in potestate habemus: item per eos servos, in quibus usumfructum habemus: item per homines liberos et servos alienos, quos bona fide possidemus. De quibus singulis diligentius dispiciamus.

We acquire not only by ourselves, but also by those whom we have in our power; also by slaves, of whom we have the usufruct; and by those freemen and slaves belonging to others whom we possess *bona fide*. Let us examine separately these different cases.

GAI. ii. 86.

The rule of law was, that no one could acquire through another person; but if persons in the power of another acquired anything, that which they acquired became, by the mere force of their position, the property of the person in whose power they were; and thus the rule may be, perhaps, more accurately expressed by saying that nothing could be acquired *per extraneam personam*, i.e. through a person who was not in the *familia* of the acquirer.

1. Igitur liberi vestri utriusque sexus, quos in potestate habetis, olim quidem, quidquid ad eos pervenerat (exceptis videlicet castrensibus peculiis), hoc parentibus suis adquirebant sine ulla distinctione: et hoc ita parentum fiebat, ut esset eis licentia, quod per unum vel unam eorum adquisitum est, alii filio vel extraneo donare vel vendere vel quocumque modo voluerant, applicare. Quod nobis inhumanum visum est et generali constitutione emissa et liberis pepercimus et patribus debitum reservavimus. Sancitum etenim a nobis est, ut, si quid ex re patris ei obveniat, hoc secundum antiquam observationem totum parenti adquirat (quæ enim invidia est, quod ex patris occasione

1. Formerly, all that your children under your power of either sex acquired, excepting *castrensia peculia*, was without distinction acquired for the benefit of their ascendants; so much so, that the *paterfamilias* who had thus acquired anything through one of his children, could give or sell, or transfer it in any way he pleased to another child or to a stranger. This appeared to us very harsh, and by a general constitution we have relieved the children, and yet reserved for the ascendants all that was due to them. We have declared that all which the *filiusfamilias* obtains by means of the fortune of the father, shall, according to the old law, be acquired entirely for the father's benefit: for what hardship is there in that which comes from

profectum est, hoc ad eum reverti?): quod autem ex alia causa sibi filiusfamilias adquisivit, hujus usumfructum quidem patri adquirat, dominium autem apud eum remaneat, ne, quod ei suis laboribus vel prospera fortuna accessit, hoc in alium perveniens, luctuosum ei procedat.

the father returning to him? But of everything that the *filiusfamilias* acquires in any other way, he shall acquire the usufruct for the father, but the son shall retain the ownership, so that the son may not have the mortification of seeing that becoming the property of another, which he himself has gained by his labour or good fortune.

GAI. ii. 87; C. vi. 61. 6.

The *filiusfamilias* could not, in the strict law of Rome, have any property of his own. Sometimes, however, the father permitted the son to have what was called a *peculium*, that is, a certain amount of property placed under his exclusive control. This *peculium* remained in law the property of the father, but the son had the disposition and management of it by his father's permission, and as long as it remained in the son's possession it was, as far as regarded third persons, exactly like property really belonging to the son only, that is, they could sue and recover from him to the extent of his *peculium*. (See Tit. 12. pr. of this Book.) In the early times of the Empire a *filiusfamilias* came to have, under the name of *castrense peculium*, property quite independent of his father. This *castrense peculium* consisted of all that was given to a son when setting out upon military service, or acquired while that service lasted. (D. xlix. 17. 1.) This belonged to the son as completely as if he had been *sui juris*, and he had full power of disposing of it either during his lifetime or by testament. *Filiifamilias in castrensi peculi ovice patrumfamiliarum funguntur.* (D. xiv. 6. 2.) If, however, he did not choose to exercise his power of disposing of it by testament, his father took it at his death, not as succeeding to it *ab intestato*, but as the claimant of a *peculium*. (See Tit. 12. pr.) A further benefit was extended to the *filiusfamilias* by the institution of the *quasi-castrense peculium*, a privilege given to certain civil functionaries, corresponding to that given by the *castrense peculium* to soldiers. Constantine, by a constitution (C. xii. 31), placed on the footing of the *castrense peculium* things which a *filiusfamilias*, who was an officer of the palace, received from the emperor or gained by his own economy. The same advantage was subsequently extended to many other functionaries, as well as to advocates and certain ecclesiastical dignitaries. The *quasi-castrense peculium* must have existed in the time of Ulpian (D. xxxvi. 1. 1. 6; xxxix. 5. 7. 6), unless the passages in the Digest in which he alludes to it are interpolated, but under what form it then existed we do not know. In one respect it slightly differed from the *castrense peculium*; for the power of disposing of it by testament did not always accompany it, but was only given to the more privileged classes of those who were allowed to have such a *peculium*. Justinian, however, altered this, and gave the power

of disposing of it by testament to every one who had a *quasi-castrense peculium*. (See Tit. 11. 6.) Constantine also introduced another kind of *peculium*, termed the *peculium adventitium*. This consisted of everything received by a *filiusfamilias* from his mother at her death, whether by testament or not. (C. vi. 60. 1.) Subsequent emperors included in it all received by succession or as a gift *inter vivos* from maternal ascendants (C. vi. 60. 2), or by one of two married persons from the other (C. vi. 61. 1); and Justinian, as we learn from the text, included under the *peculium adventitium* all that came to the son from any other source than from the father himself. The father had the usufruct of the *peculium adventitium*, and it was only the ownership that was held by the son. The *peculium* which came to the son as part of the father's property, and which continued to belong to the father, has been termed by commentators *profectitium*, because it comes (*proficiscitur*) from the father.

The *peculium* in the time of Justinian, therefore, if *profectitium*, belonged to the father; in all other cases it belonged to the son; but the father had the usufruct of the *peculium adventitium*, while the son had as full power over the *castrense* or *quasi-castrense peculium* as if he had been *sui juris*.

2. Hocque a nobis dispositum est et in ea specie, ubi parens emancipando liberum ex rebus, quæ adquisitionem effugiunt, sibi partem tertiam retinere, si voluerat, licentiam ex anterioribus constitutionibus habebat, quasi pro pretio quodammodo emancipationis, et inhumanum quiddam accidebat, ut filius rerum suarum ex hac emancipatione dominio pro parte defraudetur et, quod honoris ei ex emancipatione additum est, quod sui juris effectus est, hoc per rerum deminutionem decrescat. Ideoque statuimus, ut parens pro tertia bonorum parte dominii, quam retinere poterat, dimidiam non dominii rerum, sed ususfructus retineat: ita etenim et res intactæ apud filium remanebunt et pater ampliore summa fruetur, pro tertia dimidia potiturus.

2. We have also made some regulations with respect to the power which under former constitutions a father had, when emancipating his children, of deducting a third part from the things over which he had no right of acquisition, as if this was the price of the emancipation. It seemed very hard that the son should thus be deprived by emancipation of a third part of his property, and that what he gained in honour by being emancipated, as being thus made *sui juris*, should be impaired by a diminution of his property. We have therefore enacted that the father, instead of retaining a third as owner, shall retain half not as owner but as usufructuary. Thus the ownership in the whole will remain with the son unimpaired, while the father will enjoy the benefits of a larger portion, the half, namely, instead of the third.

C. vi. 61. 6. 3.

The usufruct of the father over things, the ownership of which, as part of the *peculium adventitium*, belonged to the son, would be lost by emancipation. It was as an equivalent for this that the property in one-third of these things was given to the father on emancipation. Justinian substitutes the usufruct of one-half for the ownership of one-third.

3. Item vobis adquiritur, quod servi vestri ex traditione nanciscun-

3. So, too, all that your slaves acquire by tradition, or stipulation, or

tur, sive quid stipulentur vel ex qualibet alia causa adquirunt. Hoc enim vobis et ignorantibus et invitis obvenit. Ipse enim servus, qui in potestate alterius est, nihil suum habere potest. Sed si heres institutus sit, non alias nisi jussu vestro hereditatem adire potest: et si jubentibus vobis adierit, vobis hereditas adquiritur, perinde ac si vos ipsi heredes instituti essetis. Et convenienter scilicet legatum per eos vobis adquiritur. Non solum autem proprietas per eos, quos in potestate habetis, adquiritur vobis, sed etiam possessio: cujuscumque enim rei possessionem adepti fuerint, id vos possidere videmini. Unde etiam per eos usucapio vel longi temporis possessio vobis accedit.

in any other way, is acquired for you, and that even without your knowledge and against your wishes. For the slave being in the power of another cannot himself have anything as his own. And if he is instituted heir, he cannot enter on the inheritance except by your direction. And if he enters by your direction, you acquire the inheritance exactly as if you had yourselves been instituted heirs. Legacies, again, are equally acquired for you by your slaves. And it is not only the ownership which is acquired for you by those whom you have in your power, but also the possession. Everything of which they have obtained possession you are considered to possess, and consequently usucapion or possession *longi temporis* operates for you through them.

GAI. ii. 87. 89.

All that the slave had belonged to his master; and this rule was subject to no exceptions such as those introduced for the benefit of the *filiusfamilias*. The slave's *peculium* was always at the disposition of his master, and it made no difference what was the mode in which he acquired: he acquired it for his master even though his master had not consented or even known of the acquisition. Therefore, if the slave received anything in pursuance of a stipulation (*sive quid stipulentur*), he acquired it for his master, although he could not bind his master by promising anything to a person who stipulated for anything from him. The slave could not make his master's condition worse; and as an inheritance might be more onerous than lucrative, for the debts of the deceased, which the heir was bound to pay, might exceed the value of his property, a slave was not permitted to accept an inheritance, except by his master's express command. A legacy, on the other hand, could not be otherwise than advantageous, and therefore a legacy given to a slave immediately belonged to his master. There was a minor difference between the institution of a slave as heir, and a gift to him of a legacy, which deserves mention. The right to a legacy dated from the death of the deceased; the right to an inheritance dated from the time of entering on an inheritance. The slave, therefore, acquired a legacy for the benefit of the master to whom he belonged at the time when the deceased died; but a slave instituted heir, acquired for the master to whom he belonged at the time of entering on the inheritance. If, therefore, the slave changed masters or became free between these times, he acquired a legacy for his former master, but took an inheritance for his new master, or, if free, for himself.

The physical fact of possession might be accomplished through

a slave, but not the intention, which was requisite for legal possession. It was necessary that the master should have the intention of treating the thing possessed by the slave as if he himself was the owner. *Animo nostro*, says Paul, *corpore etiam alieno, possidemus*. (D. xli. 2. 3. 12.) The master could not, therefore, acquire through the slave legal possession, as opposed to mere detention, without his knowledge and consent, as he could acquire ownership; except, indeed, when the slave possessed a thing as part of his *peculium*, for then the permission to have a *peculium* was considered as indicating a general intention on the part of the master applying to, and completing, legal possession in everything acquired as part of the *peculium*. (D. xli. 2. 1. 5.)

All that is said here of the slave may, with the necessary exceptions as to the *peculia castrensia*, *quasi-castrensia*, and *adventitia*, be said of the *filiusfamilias*, who equally stipulated for his father's benefit, could not make his father's position worse, took inheritances only under his father's direction, received legacies for his father's benefit, and possessed physically, but needed his father's *animus possidendi*.

4. De his autem servis, in quibus tantum usumfructum habetis, ita placuit, ut, quidquid ex re vestra vel ex operibus suis adquirant, id vobis adiciatur, quod vero extra eas causas persecuti sunt, id ad dominum proprietatis pertineat. Itaque si is servus heres institutus sit legatumve quid ei aut donatum fuerit, non usufructuario, sed domino proprietatis adquiritur. Idem placet et de eo, qui a vobis bona fide possidetur, sive is liber sit sive alienus servus; quod enim placuit de usufructuario, idem placet et de bona fide possessore. Itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus est. Sed bonæ fidei possessor cum usuceperit servum, quia eo modo dominus fit, ex omnibus causis per eum sibi adquirere potest: fructuarius vero usucapere non potest, primum quia non possidet, sed habet jus utendifruendi, deinde quia scit, servum alienum esse. Non solum autem proprietas per eos servos, in quibus usumfructum habetis vel quos bona fide possidetis, vel per liberam personam, quæ bona fide vobis servit, adquiritur vobis, sed etiam possessio: loquimur autem in utriusque persona secundum definitionem, quam proxime exposuimus, id est si quam possessionem ex re vestra vel ex operibus suis adepti fuerint.

4. As to slaves of whom you have only the usufruct, it has been decided that whatever they acquire by means of anything belonging to you, or by their own labour, shall belong to you; but that all they acquire from any other source shall belong to the owner. So if a slave is made heir, or anything is given him as a legacy or gift, it is the owner, not the usufructuary, who receives the benefit of the acquisition. It is the same with regard to any one whom you possess *bona fide*, whether a freeman or the slave of another person (for the rule with regard to the usufructuary holds good with regard to the *bona fide* possessor); and so everything the person possessed acquires, except from one of the two sources above mentioned, belongs to himself if he is a freeman, and to his master if he is a slave. When the *bona fide* possessor has gained the property in the slave by usucapion, he, of course, becomes the owner, and all that the slave acquires is acquired for him. But the usufructuary cannot acquire a slave by use: first, because he has not the possession, but only the right of usufruct; and secondly, because he knows that the slave belongs to another. It is not only the ownership that is acquired for you by the slaves of whom you have the usufruct, or whom you possess *bona fide*, or by a free person whom you employ as your slave *bona fide*; you acquire also the

possession. But in saying this we must be understood, with regard to both slaves and freemen, to adhere to the distinction laid down previously, and to refer only to the possession they have obtained by means of something belonging to you, or by their own labour.

GAI. ii. 91-94.

The usufructuary was entitled to the fruits of the slave, that is, to his services, and to the profits derived from letting out his services to others; but what the slave acquired by stipulation, gift, legacy, or similar means, was no part of the fruits, and therefore did not belong to the usufructuary. If the means of acquisition were derived from the usufructuary, as, for instance, if the slave acquired by parting with any of the produce, then the case would be different.

What is true of the usufructuary is true also of a *bona fide* possessor either of the slave of another, or of a person in fact free, but honestly believed to be a slave. And the *bona fide* possessor has the advantage over the usufructuary pointed out in the text, that as he has the possession, which no usufructuary can have, for no usufructuary intends to treat the thing as if he were the owner, this possession may, if continued long enough, give the rights of usucapion over a moveable, or of *possessio longi temporis* over an immoveable.

5. Ex his itaque apparet, per liberos homines, quos neque vestro juri subjectos habetis neque bona fide possidetis, item per alienos servos, in quibus neque usumfructum habetis neque justam possessionem, nulla ex causa vobis adquiri posse. Et hoc est, quod dicitur, per extraneam personam nihil adquiri posse: excepto eo, quod per liberam personam veluti per procuratorem placet non solum scientibus, sed etiam ignorantibus vobis adquiri possessionem secundum divi Severi constitutionem et per hanc possessionem etiam dominium, si dominus fuit, qui tradidit, vel per usucapionem aut longi temporis præscriptionem, si dominus non sit.

5. Hence it appears that you cannot acquire by means of free persons not in your power, or possessed by you *bona fide;* nor by the slave of another, of whom you have neither the usufruct nor the lawful possession. And this is meant, when it is said, that nothing can be acquired by means of a stranger; except, indeed, that according to the constitution of the Emperor Severus, possession may be acquired for you by a free person, as by a procurator, not only with, but even without, your knowledge; and by this possession you acquire the property, if it was the owner who delivered the thing, or by usucapion or prescription *longi temporis,* if it was not.

GAI. ii. 95; C. iv. 27. 1; D. xli. 1. 20. 2; C. vii. 32. 1.

The rule of the older law was that no person could be represented *per extraneam personam,* i.e. by a person who was not under his power, in any of those acts which were regulated by the civil law. Thus, no one could acquire the ownership of a thing for another; if he received anything, as, for instance, by mancipation or *in jure cessio,* although he received it expressly for another, still this other person did not thereby acquire the property in the thing. But a mere natural fact such as that of possession

could take place for the benefit of one person through another person, if the person for whose benefit the thing was possessed had but the intention of profiting by it, and then this possession might lead through usucapion to ownership. If, however, a person was charged with the management of the affairs of another, he could exercise an intention of possessing for the benefit of the person for whom he acted, which a mere stranger could not; and thus it was possible *non solum scientibus sed etiam ignorantiubs*, i.e. for persons who did not know even of the fact of possession, to acquire legal possession through an agent. But, though the text would be likely to mislead us, we learn from a constitution of Severus and Antoninus (C. vii. 32. 1), which does not appear to have made any great change in the law, that usucapion did not commence until the person, for whose benefit the thing was possessed, knew of the possession. If the procurator received possession from a person who was the owner, then it was not a question of getting ownership by usucapion, and the ownership immediately passed to the person for whom the procurator was acting, even though this person did not know of what was done. *Si procurator rem mihi emerit ex mandato meo eique sit tradita meo nomine, dominium mihi, id est proprietas, adquiritur etiam ignoranti.* (D. xli. 1. 13.)

6. Hactenus tantisper admonuisse sufficiat, quemadmodum singulæ res adquiruntur: nam legatorum jus, quo et ipso singulæ res vobis adquiruntur, item fideicommissorum, ubi singulæ res vobis relinquuntur, opportunius inferiori loco referemus. Videamus itaque nunc, quibus modis per universitatem res vobis adquiruntur. Si cui ergo heredes facti sitis sive cujus bonorum possessionem petieritis vel si quem adrogaveritis vel si cujus bona libertatum conservandarum causa vobis addicta fuerint, ejus res omnes ad vos transeunt. Ac prius de hereditatibus dispiciamus. Quarum duplex condicio est: nam vel ex testamento vel ab intestato ad vos pertinent. Et prius est, ut de his dispiciamus, quæ vobis ex testamento obveniunt. Qua in re necessarium est, initio de ordinandis testamentis exponere.

6. What we have said respecting the modes of the acquisition of particular things, may suffice for the present. For we shall speak more conveniently hereafter of the law of legacies, by which also you acquire property in particular things, and of *fideicommissa*, by which particular things are left to you. Let us now speak of the modes of acquiring *per universitatem*. If you are made heir, or claim possession of the goods of any one, or arrogate any one, or goods are adjudged to you in order to preserve the liberty of slaves, in these cases all that belonged to such person passes to you. First let us treat of inheritances, which may be divided into two kinds, according as they come to you by testament or *ab intestato*. We will begin with those which come to you by testament; and for this it is necessary in the first place to explain the formalities requisite in making testaments.

Gai. ii. 97-100.

We now pass to the acquisition of a *universitas rerum*, to the cases in which one man succeeded to the *persona* of another, and acquired in a mass all his goods and all his rights and duties. (See Introd. sec. 74.)

TIT. X. DE TESTAMENTIS ORDINANDIS.

Testamentum ex eo appellatur, quod testatio mentis est.

The word testament is derived from *testatio mentis*; it testifies the determination of the mind.

D. xxviii. 1. 1.

With respect to this derivation it is scarcely necessary to say that *-mentum* is merely a termination, and not derived from *mens*. Ulpian (*Reg.* 20. 1) gives as a definition of a testament, *mentis nostræ justa contestatio, in id solemniter facta, ut post mortem nostram valeat*; and Modestinus (D. xxviii. 1. 1) gives *voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri vult*; the word *justa* implying in each, that, in order to be valid, the testament must be made in compliance with the forms of law.

1. Sed ut nihil antiquitatis penitus ignoretur, sciendum est, olim quidem duo genera testamentorum in usu fuisse, quorum altero in pace et in otio utebantur, quod calatis comitiis appellabatur, altero, cum in prœlium exituri essent, quod procinctum dicebatur. Accessit deinde tertium genus testamentorum, quod dicebatur per æs et libram, scilicet quia per emancipationem, id est imaginariam quandam venditionem, agebatur, quinque testibus et libripende, civibus Romanis puberibus, præsentibus et eo, qui familiæ emptor dicebatur. Sed illa quidem priora duo genera testamentorum ex veteribus temporibus in desuetudinem abierunt: quod vero per æs et libram fiebat, licet diutius permansit, attamen partim et hoc in usu esse desiit.

1. That nothing belonging to antiquity may be altogether unknown, it is necessary to observe, that formerly there were two kinds of testaments in use: the one was employed in times of peace, and was named *calatis comitiis*; the other was employed at the moment of setting out to battle, and was termed *procinctum*. A third species was afterwards added, called *per æs et libram*, being effected by mancipation, that is an imaginary sale in the presence of five witnesses and the *libripens*, all citizens of Rome, above the age of puberty, together with him who was called the *emptor familiæ*. The two former kinds of testaments fell into disuse even in ancient times; and that made *per æs et libram* also, although it has continued longer in practice, has now in part ceased to be made use of.

GAI. ii. 101-104.

When the head of a family died, the law in ancient times determined on whom his *persona*, that is, the aggregate of his political and social rights and duties, should devolve. But we cannot say that there was any definite period of Roman history when a man could not make a will. Originally, as we learn from the text, which is borrowed from Gaius, testaments were made in the *comitia calata*, or *in procinctu*. By *calata comitia* is meant the *comitia curiata* summoned (*calata*) for the despatch of what we may term private business. This took place twice a year. We do not know how far it was open to any one at the meeting to oppose a testament, or whether the *comitia* merely registered the testaments declared in their presence. Subsequently the mode of making testaments *per æs et libram*, that is, by a fictitious sale, was introduced, and both this mode and that of declaration before the *comitia curiata*

were used indifferently, nor is there any evidence to show that the one form was considered more appropriate to the *patres* than the other. Only members of the patrician *gentes* sat in the *comitia curiata*, but that is no reason why the plebeians should not have come before these *comitia* to declare their testaments. The Twelve Tables declared *uti legassit super pecunia tutelave suæ rei, ita jus esto,* that is, every one's testamentary dispositions should be carried into effect, and the necessity for the provision may have arisen from some kind of tampering on the part of members of the *comitia* with the testaments of plebeians.

Procinctus properly means an army in marching and fighting order. *Procinctus est expeditus et armatus exercitus.* (GAI. ii. 101.) The testament is said to be *procinctum,* but properly it ought to be *in procinctu factum.* Cicero speaks (*de Or.* i. 53) of the testament *in procinctu* as then in use, and describes it as made *sine libra et tabulis*, that is, without the forms usual in the *testamentum per æs et libram.*

In the *testamentum per æs et libram,* the *hereditas* was sold by *mancipatio* to the purchaser. Originally the testator sold the inheritance to the person who was really to be the heir. The purchaser, as Gaius expresses it, *heredis locum obtinebat*, and the testator instructed him how he wished his property to be disposed of after his death. But as the sale was irrevocable, a testator might be very glad to escape from proclaiming an heir whose position he could not afterwards affect. The object was attained by selling the inheritance to a third person; and the *familiæ emptor* came to be thus a mere stranger, who was only appointed *dicis gratia*, to go through the form of sale. (GAI. ii. 103.) The process of selling to this fictitious stranger is given at length in Gaius (ii. 104). The testator having written out his will, summoned five witnesses, and a balance-holder (*libripens*), and then gave by mancipation his inheritance to the purchaser. The purchaser, on receiving it, instead of using the ordinary form, pronounced these words, *Familiam pecuniamque tuam endo mandatela tutela custodelaque mea recipio eaque quo tu jure testamentum facere possis secundum legem publicam hoc ære* (or, as some added, *æneaque libra*) *esto mihi empta;* he then, after striking the scale with it, gave the piece of copper to the testator as the price of the inheritance. The testator then produced the tablets on which his testament was written, and said, *Hæc ita, ut in his tabulis cerisque scripta sunt, ita do, ita lego, ita testor; itaque vos, Quirites, testimonium mihi perhibetote.* This announcement of his wishes was termed *nuncupatio. Nuncupare est palam nominare.* (GAI. ib.) The term is properly applicable to the oral statement; but the expression of the testator's wishes was really considered as always made orally, as the announcement that the written documents contained a declaration of the testator's wishes was taken as a compendious mode of stating what those wishes were. (GAI. ib.)

The concluding words of the paragraph, *partim et hoc in usu esse desiit*, refer to the change above mentioned from a sale to the real heir to a sale to a stranger. The sale became a mere matter of form, and the testament was that which the testator wrote. When the mode of making testaments by the *calata comitia* fell into disuse we do not know, but probably at an early time of the Republic. The imperial constitutions (see next Title) gave all soldiers the power of making a testament without observing the usual forms, and the testaments of soldiers under the Empire were valid, not as being made *in procinctu*, that is, by virtue of the army being regarded as an assembly of citizens, but by the power which was given to each soldier of making an informal testament. In what way they gave greater liberty to the soldier than the old power of making the will *in procinctu* we cannot say; but probably the making of the testament *in procinctu* was connected with the taking of the auspices, and thus was more liable to be declared informal.

2. Sed prædicta quidem nomina testamentorum ad jus civile referebantur. Postea vero ex edicto prætoris alia forma faciendorum testamentorum introducta est: jure enim honorario nulla mancipatio desiderabatur, sed septem testium signa sufficiebant, cum jure civili signa testium non erant necessaria.

2. The kinds of testament which we have just mentioned belonged to the civil law, but afterwards another form of making testaments was introduced by the edict of the prætor. By the *jus honorarium* no sale was necessary, but the seals of seven witnesses were sufficient, whereas the seals of witnesses were not required by the civil law.

There was no necessity, as the text tells us, that a written will made in the old form *per æs et libram* should be sealed. After the prætorian form of making wills became usual, a *senatusconsultum* provided (as we learn from Paul, *Sent.* v. 25. 6) that a written testament should be made on tablets of wax. These tablets were held together at one margin with the wire, and in the opposite margin there was a perforation made through all the tablets, and through this was passed a triple linen thread, and then the tablets were covered with wax on the outside, and the witnesses placed their seal (that is, made a mark with their rings) on this external wax. It was also customary for them to write their names and to state whose will it was they had witnessed (D. xxviii. 1. 30), but this was not a necessary part of the form until made so by a constitution of Theodosius and Valentinian. (C. vi. 23. 21.) This constitution also permitted a will to be made in a roll, which, if the testator wished to keep the terms secret, he might close and seal up, leaving the foot of the roll open, on which the witnesses were to put their seals and subscriptions. The testator was, under this constitution, to subscribe his name or get an eighth witness to subscribe it for him.

The prætor, as the text informs us, permitted an heir instituted in a testament to have the inheritance, even though the form of mancipation was not gone through. He could not,

indeed, make this person heir, for it was necessary that an heir should derive his rights exclusively from the civil law: but he gave him the *bonorum possessio*, that is, permitted him to enjoy exactly what he would have enjoyed if he had been properly constituted heir, and then usucapion soon made him Quiritarian owner. (See Bk. ii. Tit. 6.) The prætor, however, required that the testament in which he was instituted should have been made in the presence and attested by the seals of seven witnesses. This was really the number of witnesses which there would have been, had the form of mancipation been gone through, if the *libripens* and *familiæ emptor* were included. Thus the prætor, while dispensing with the mere form of mancipation, retained exactly the same check against fraud, which that form would have afforded. (See ULP. *Reg.* 28. 6.)

3. Sed cum paulatim tam ex usu hominum quam ex constitutionum emendationibus cœpit in unam consonantiam jus civile et prætorium jungi, constitutum est, ut uno eodemque tempore, quod jus civile quodammodo exigebat, septem testibus adhibitis et subscriptione testium, quod ex constitutionibus inventum est, et ex edicto prætoris signacula testamentis imponerentur: ut hoc jus tripertitum esse videatur, ut testes quidem et eorum præsentia uno contextu testamenti celebrandi gratia a jure civili descendant, subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur, signacula autem et numerus testium ex edicto prætoris.

3. But when the progress of society and the imperial constitutions had produced a fusion of the civil and the prætorian law, it was established that the testament should be made at one and the same time (a point required to some extent by the civil law), in the presence of seven witnesses, and with the subscription of the witnesses (a formality introduced by the constitutions), and with their seals appended, according to the edict of the prætor. Thus what is now required seems to have had a triple origin. The witnesses, and their presence at one continuous time for the purpose of giving the testament the requisite formality, are derived from the civil law; the subscriptions of the testator and witnesses, from the imperial constitutions; and the seals of the witnesses and their number, from the edict of the prætor.

C. vi. 23. 21.

The different formalities requisite were to be gone through, one immediately following after another, so as to make the whole one transaction. *Est autem uno contextu nullum actum alienum testamento intermiscere.* (D. xxviii. 1. 21. 3.)

It was, by the above-mentioned constitution, enacted in the reign of Valentinian the Third in the East, and of Theodosius the Second, his colleague, in the West, A.D. 439, that the new form of testament described in the text, and which received the name of *testamentum tripartitum*, was substituted for the ancient ones. But in the West the form *per æs et libram* was never quite superseded, and traces of it are to be found even in the middle ages.

4. Sed his omnibus ex nostra constitutione propter testamentorum sinceritatem, ut nulla fraus adhibea-

4. In addition to all these formalities we have enacted by our constitution, as a security for the genuineness

tur, hoc additum est, ut per manum testatoris vel testium nomen heredis exprimatur et omnia secundum illius constitutionis tenorem procedant.

of testaments, and to prevent fraud, that the name of the heir shall be written in the handwriting either of the testator or of the witnesses; and that everything shall be done according to the tenor of that constitution.

C. vi. 23. 29.

This additional formality, imposed by Justinian, was afterwards abolished by him. (Nov. 119. 9.)

5. Possunt autem testes omnes et uno anulo signare testamentum (quid enim, si septem anuli una sculptura fuerint?) secundum quod Pomponio visum est. Sed et alieno quoque anulo licet signare.

5. All the witnesses may, as Pomponius held, seal the testament with the same seal; for what if the engraving on all seven seals was the same? And a seal may be used belonging to another person.

D. xxviii. 1. 22. 2.

6. Testes autem adhiberi possunt ii, cum quibus testamenti factio est. Sed neque mulier neque impubes neque servus neque mutus neque surdus neque furiosus nec cui bonis interdictum est, nec is, quem leges jubent improbum intestabilemque esse, possunt in numero testium adhiberi.

6. Those persons can be witnesses with whom there is *testamenti factio*. But women, persons under the age of puberty, slaves, dumb persons, deaf persons, madmen, prodigals restrained from having their property in their power, and persons declared by law to be worthless and incompetent to witness, cannot be witnesses.

D. xxviii. 1. 20. 4, 7; D. xxviii. 1. 26.

When testaments were made *per æs et libram*, as no one could take part in the ceremony of mancipation who did not share in the *jus Quiritium*, no *peregrinus*, no one who had not the *commercium*, could be a witness to a testament. It was equally necessary that the seller, i.e. the testator, and the purchaser, that is (in the old form), the heir, should share in the *jus Quiritium*. And therefore no one who had not the *commercium* could take any part in the *testamenti factio*, the ceremony of making a testament, either as testator, heir, or witness; and this was expressed by saying that they were not persons with whom there was *testamenti factio*—not persons, that is, with whom any citizen could join in such a ceremony.

In the general language of Roman law *testamenti factio* thus came to mean the capacity (1) of making a will; (2) of taking under a will; (3) of being witness to a will.

To the list of persons who had not *testamenti factio* under the last of these heads, that is, who could not be witnesses to wills, given in this paragraph, we have to add, from paragraphs 9 and 10, persons in the power of the testator and the heir and persons belonging to the heir's family.

The subject of the incapacity to make a will is discussed in the 12th Title, and that of the incapacity to take under a will in the 14th Title; but that the subject of *testamenti factio* may be viewed as a whole, it may be convenient to give here a summary of the rules under these two heads.

1. *Making a Will.*—Slaves (except slaves belonging to the State who could leave half their *peculium* by will (ULP. *Reg.* 20. 17)) could not make a will. A person in captivity could not make a will (see Title 12. 5); nor could persons who had suffered the *maxima* or *media capitis deminutio* (D. xxviii. 1. 8. 1, 2, and 4); nor, so long as the law recognised this distinction of persons, could *Latini Juniani, peregrini*, or *dediticii*. (ULP. *Reg.* 20. 14, 15.) A dumb man and a deaf man, the former because he could not utter the words of the *nuncupatio*, the deaf man because he could not hear the words of the *emptor familiæ* (ULP. *Reg.* 20. 13), could not make a will, but subsequently provisions were made for allowing the dumb, the deaf, and the blind to make wills under certain safeguards. (See Tit. 12. 3 and 4.) Women at the time of Justinian could make wills. But formerly they could only make a will *per æs et libram*, and with the consent of their tutor. (GAI. ii. 113.) Persons *in manu* or *in potestate* could not make wills except *filiifamiliarum* with regard to their *peculium castrense* or *quasi-castrense*. (See Tit. 12. pr.) Madmen, persons under puberty, and prodigals interdicted from the management of their affairs could not make wills (Tit. 12. 1 and 2), nor persons made *intestabiles* for a crime or those condemned for a libel *ob carmen famosum* (D. xxviii. 1. 18. 1), for spoliation *repetundarum* (D. xxii. 5. 15), or adultery (D. xxii. 5. 14).

The extent to which the incapacity to make a will applying to other persons was removed in favour of a soldier on service is discussed in Title 11.

2. *Taking under a Will.*—The capacity to take under a will was much wider than that of making a will; and when *fideicommissa* were instituted, many persons who could not be heirs or legatees took the benefit of a *fideicommissum*. (See Tit. 23.)

But (apart from *fideicommissa*) *peregrini* and *Latini*, unless the will was that of a soldier (GAI. ii. 110), and *dediticii* (ULP. *Reg.* 22. 2), could not take as heirs or legatees. Nor could women under the *lex Voconia*, B.C. 169 (GAI. ii. 274), if the fortune of the testator exceeded 100,000 sesterces. Nor any uncertain person, as an unborn child (Tit. 20. 26), or a corporate body (ULP. *Reg.* 22. 5), or any of the gods, except those in whose favour, as the Tarpeian Jupiter, an exception had been made by a *senatusconsultum* or a constitution. (ULP. *Reg.* 22. 6.) These disabilities had all ceased before, or were abolished by Justinian. (C. vi. 48. 1.) Under the *lex Julia et Papia Poppæa* (see note on Tit. 20. 8), until the restrictions imposed by it in this respect were abolished by Constantine (C. viii. 58. 1), unmarried persons (*cœlibes*) could not take any part, and childless persons (*orbi*) could only take half of what was given them. There were still, however, some persons who under Justinian's legislation could not take, such as the children of persons convicted of treason (C. ix. 8. 5. 1), and apostates and heretics (C. i. 7. 3); and children of,

and parties to, prohibited marriages could not take under the will of the parents, or of the other party to the marriage (C. v. 9. 6). Until a late period of the Empire natural children and their mother were excluded, but, as we learn from the 89th Novel (12. pr., 1, 2, 3), a constitution of the Emperors Valens, Valentinian, and Gratian permitted a twelfth of the testator's property to be given to the natural children and their mother where there were legitimate children, and a fourth where there were none, and the testator's parents were not alive; and Justinian extended this fourth to the whole inheritance, their *legitima portio* (see note on Tit. 18. 3) being reserved to the testator's ascendants, if any.

7. Sed cum aliquis ex testibus testamenti quidem faciendi tempore liber existimabatur, postea vero servus apparuit, tam divus Hadrianus Catonio Vero quam postea divi Severus et Antoninus rescripserunt, subvenire se ex sua liberalitate testamento, ut sic habeatur, atque si, ut oportet, factum esset, cum eo tempore, quo testamentum signaretur, omnium consensu hic testis liberorum loco fuerit nec quisquam esset, qui ei status quæstionem moveat.

7. A witness, who was thought to be free at the time of making the testament, was afterwards discovered to be a slave, and the Emperor Hadrian, in his rescript to Catonius Verus, and afterwards the Emperors Severus and Antoninus by rescript, declared, that they would aid such a defect in a testament, so that it should be considered as valid as if made quite regularly; since, at the time when the testament was sealed, this witness was commonly considered a free man, and there was no one who contested his *status*.

C. vi. 23. 1.

Regard was had only to what was the condition of witnesses at the time of signature, not at that of the death of the testator. (D. xxviii. 1. 22. 1.)

8. Pater nec non is, qui in potestate ejus est, item duo fratres, qui in ejusdem patris potestate sunt, utrique testes in unum testamentum fieri possunt: quia nihil nocet ex una domo plures testes alieno negotio adhiberi.

8. A father, and a son in his power, or two brothers under the power of the same father, may be witnesses to the same testament; for nothing prevents several persons of the same family being witnesses in a matter which only concerns a stranger.

No one of the same family with the testator or heir could be a witness to the testament, a family comprising, in this sense, the head and those under his power; for they had so intimate a connection with each other that they might be said to be witnesses for themselves, if they were witnesses for each other.

9. In testibus autem non debet esse, qui in potestate testatoris est. Sed si filiusfamilias de castrensi peculio post missionem faciat testamentum, nec pater ejus recte testis adhibetur nec is, qui in potestate ejusdem patris est: reprobatum est enim in ea re domesticum testimonium.

9. But no person under power of the testator can be a witness. And if a *filiusfamilias* makes, after leaving the service, a testament disposing of his *castrense peculium*, neither his father, nor any one in the power of his father, can be a witness. For, in this case, the law does not allow of the testimony of a member of the same family.

Gai. ii. 105, 106.

This had been a point on which the jurists were disagreed. Justinian here follows the opinion of Gaius (ii. 106), rejecting that of Ulpian and Marcellus. (D. xxviii. 1. 20. 2.) The question could only arise respecting a testament made *post missionem*, as if it was made during service, it would be entitled to the exemptions accorded to military testaments.

10. Sed neque heres scriptus neque is, qui in potestate ejus est, neque pater ejus, qui habet eum in potestate, neque fratres, qui in ejusdem patris potestate sunt, testes adhiberi possunt, quia totum hoc negotium, quod agitur testamenti ordinandi gratia, creditur hodie inter heredem et testatorem agi. Licet enim id olim jus tale valde conturbatum fuerat et veteres, qui familiæ emptorem et eos, qui per potestatem ei coadunati fuerant, testamentariis testimoniis repellebant, heredi et his, qui conjuncti ei per potestatem fuerant, concedebant testimonia in testamentis præstare, licet hi, uqi id permittebant, hoc jure minime abuti debere eos suadebant: tamen nos, eandem observationem corrigentes et, quod ab illis suasum est, in legis necessitatem transferentes, ad imitationem pristini familiæ emptoris merito nec heredi, qui imaginem vetustissimi familiæ emptoris optinet, nec aliis personis, quæ ei, ut dictum est, conjunctæ sunt, licentiam concedimus sibi quodammodo testimonia præstare: ideoque nec ejusmodi veterem constitutionem nostro codici inseri permisimus.

10. No person instituted heir, nor any one in subjection to him, nor his father, in whose power he is, nor his brothers under power of the same father, can be witnesses; for the whole business of making a testament is in the present day considered a transaction between the testator and the heir. But formerly there was great confusion on this point of law; for although the ancients would never admit the testimony of the *familiæ emptor*, nor of any one connected with him by the ties of *patria potestas*, yet they admitted that of the heir, and of persons connected with him by the ties of *patria potestas*, but, while permitting this, they exhorted them not to abuse their right. We have corrected this, making illegal what they endeavoured to prevent by persuasion. For, in imitation of the old law respecting the *familiæ emptor*, we, as is proper, refuse to permit the heir, who now represents the ancient *familiæ emptor*, or any of those connected with the heir by the tie of *patria potestas*, to be, so to speak, witnesses in their own behalf; and accordingly we have not suffered the constitutions of preceding emperors on the subject to be inserted in our code.

GAI. ii. 108.

When the heir had ceased to be the *familiæ emptor*, he was no party to the transaction, and therefore it was considered he could be a witness. Gaius (ii. 108) reprobates the custom, and Justinian here pronounces it illegal. Under his legislation, there being no longer any *familiæ emptor*, the whole transaction, to use the language of the ancient mode, was between the testator and the heir.

11. Legatariis autem et fideicommissariis, quia non juris successores sunt, et aliis personis eis conjunctis testimonium non denegamus, immo in quadam nostra constitutione et hoc specialiter concessimus, et multo magis his, qui in eorum potestate sunt, vel qui eos habent in potestate, hujusmodi licentiam damus.

11. But we do not refuse the testimony of legatees, or *fideicommissarii*, or of persons connected with them, because they do not succeed to the rights of the deceased. On the contrary, by one of our constitutions we have specially accorded to them the capacity of being witnesses; and we give it still more readily to persons in

their power, and to those in whose power they are.

GAI. ii. 108.

It would appear that the objection of his being interested, which would make the heir an unfit witness, might also have been urged against the legatee; but the legatee was admitted as a witness on the technical ground of his not being the successor of the testator. The inheritance was not transmitted to him, and he was thus looked on as a stranger.

By the *senatusconsultum Libonianum*, passed in the reign of Tiberius, A.D. 16, it was provided that if a man wrote a testament for another, everything which he wrote in his own favour should be null. He could not, therefore, make himself a tutor (D. xxvi. 2. 29), an heir, or a legatee (D. xxxiv. 8. 1).

12. Nihil autem interest, testamentum in tabulis an in chartis membranisve vel in alia materia fiat.

12. It is immaterial, whether a testament be written upon a tablet, upon paper, parchment, or any other substance.

D. xxxvii. 11. 1. pr.

13. Sed et unum testamentum pluribus codicibus conficere quis potest, secundum optinentem tamen observationem omnibus factis. Quod interdum et necessarium est, si quis navigaturus et secum ferre et domi relinquere judiciorum suorum contestationem velit, vel propter alias innumerabiles causas, quæ humanis necessitatibus imminent.

13. Any person may execute any number of copies of the same testament, each, however, being made with the prescribed forms. This may be sometimes necessary; as, for instance, when a man who is going a voyage is desirous to carry with him, and also to leave at home, a memorial of his last wishes; or for any other of the numberless reasons that may arise from the various necessities of mankind.

D. xxviii. 1. 24.

Each *codex* was an original testament, valid only if itself made with all the solemnities which would have been requisite had it been the only one.

14. Sed hæc quidem de testamentis, quæ in scriptis conficiuntur. Si quis autem voluerit sine scriptis ordinare jure civili testamentum, septem testibus adhibitis et sua voluntate coram eis nuncupata, sciat, hoc perfectissimum testamentum jure civili firmumque constitutum.

14. Thus much may suffice concerning written testaments. But if any one wishes to make a testament, valid by the civil law, without writing, let him know that, if, in the presence of seven witnesses, he verbally declares his wishes, this will be a testament perfectly valid according to the civil law, and firmly established.

C. vi. 11. 2.

Thus a testator under the legislation of Justinian might either make his testament according to the form described in paragraph 3, or orally before seven witnesses.

Sua voluntate nuncupata. The word *nuncupatio* was originally used to express the declaration of the testator's intentions, whether the testament was written or not; but later usage appropriated the term *nuncupata* to testaments where there was no written will, and where the testator declared his wishes orally.

Tit. XI. DE MILITARI TESTAMENTO.

Supra dicta diligens observatio in ordinandis testamentis militibus propter nimiam imperitiam constitutionibus principalibus remissa est. Nam quamvis hi neque legitimum numerum testium adhibuerint neque aliam testamentorum sollemnitatem observaverint, recte nihilo minus testantur, videlicet cum in expeditionibus occupati sunt: quod merito nostra constitutio induxit. Quoquo enim modo voluntas ejus suprema sive scripta inveniatur sive sine scriptura, valet testamentum ex voluntate ejus. Illis autem temporibus, per quæ citra expeditionum necessitatem in aliis locis vel in suis sedibus degunt, minime ad vindicandum tale privilegium adjuvantur: sed testari quidem, et si filiifamilias sunt, propter militiam conceduntur, jure tamen communi, ea observatione et in eorum testamentis adhibenda, quam et in testamentis paganorum proxime exposuimus.

The necessity for the observance of these formalities in the construction of testaments has been dispensed with by the imperial constitutions, in favour of military persons, on account of their excessive unskilfulness in such matters. For although they neither employ the legal number of witnesses, nor observe any other requisite formality, yet their testament is valid, but only if made while they are on actual service, a proviso introduced by our constitution with good reason. Thus, in whatever manner the wishes of a military person are expressed, whether in writing or not, the testament prevails by the mere force of his intention. But during the times when they are not on actual service, and live at their own homes, or elsewhere, they are not permitted to claim this privilege. A soldier, although a *filiusfamilias*, gains from military service the power of making a testament; but he is bound by the rules of the ordinary law, and has to observe the same formalities as we explained above to be necessary for the testaments of civilians.

Gai. ii. 109; C. vi. 21. 17.

The privilege of making valid testaments, independent of any formality, was one given to soldiers, among many others of a similar kind, rather as a special favour to them than from any consideration for their *nimia imperitia*. It dates from the time of Julius Cæsar, who granted it as a temporary concession. It was made a general rule by Nerva, and confirmed by Trajan. If the testament of a soldier was written, no witness was necessary; but if not, it is doubtful whether one witness was sufficient to prove it; probably one witness sufficed, although the law, at any rate after the time of Constantine, required, as a general rule, that two witnesses at least should be produced in every case. (D. xxii. 5. 12; D. xlviii. 18. 17.) A soldier in the power of a father might make a testament disposing of his *castrense*, and, under Justinian, his *quasi-castrense peculium*. If he made it while on service, he need observe no formality in making the testament; if he did not make it while on service, he was bound to observe the usual formalities. (Gai. ii. 106.) The concluding words of the section are meant to express that it was by military service that the *filiusfamilias* gained the power of disposing at any time of his *peculium castrense*, but that this general right, unless the soldier was

on service, had to be exercised with the observance of the usual forms. Whether before the time of Justinian the soldier could make a military testament when not serving on a campaign is doubtful.

1. Plane de militum testamentis divus Trajanus Statilio Severo ita rescripsit: 'Id privilegium, quod militantibus datum est, ut quoquo modo facta ab his testamenta rata sint, sic intellegi debet, ut utique prius constare debeat, testamentum factum esse, quod et sine scriptura, a non militantibus quoque fieri potest. Is ergo miles, de cujus bonis apud te quæritur, si convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet, quem vellet sibi esse heredem et cui libertatem tribuere, potest videri sine scripto hoc modo esse testatus et voluntas ejus rata habenda est. Ceterum si, ut plerumque sermonibus fieri solet, dixit alicui: "ego te heredem facio" aut "tibi bona mea relinquo," non oportet hoc pro testamento observari. Nec ullorum magis interest quam ipsorum, quibus id privilegium datum est, ejusmodi exemplum non admitti: alioquin non difficulter post mortem alicujus militis testes existent, qui adfirment, se audisse dicentem aliquem, relinquere se bona, cui visum sit, et per hoc judicia vera subvertentur.'

1. The Emperor Trajan wrote explicitly as follows, in a rescript to Statilius Severus, with respect to military testaments: 'The privilege, given to military persons, that their testaments, in whatever manner made, shall be valid, must be understood as meaning that it must first be clear that a testament has been made (a testament may be made without writing even by persons not on military service). If, then, it appears that the soldier, concerning whose goods the action before you is now brought, did, in the presence of witnesses, called expressly for the purpose, declare who he wished should be his heir, and to what slave he wished to give freedom, he shall be considered to have made in this way a testament without writing, and effect shall be given to his wishes. But if, as is often the case in the course of conversation, he said to some one, "I appoint you my heir," or, "I leave you all my estate," such words must not be regarded as a testament. No one is more interested than those to whom this privilege has been given that such a precedent should not be admitted; otherwise it would not be difficult to procure witnesses who, after the death of a soldier, would affirm that they had heard him bequeath his goods to whomever they pleased to name; and thus the real intentions of soldiers might be defeated.'

D. xxix. 1. 24.

Convocatis ad hoc hominibus. There was no necessary ceremony of calling witnesses. If there was but proof of what the soldier's wishes were, and that he had declared them while on service, that was enough.

2. Quin immo et mutus et surdus miles testamentum facere potest.

2. A soldier, though dumb and deaf, may make a testament.

D. xxix. 1. 4.

It might happen, as Theophilus suggests, that a soldier, incapacitated for actual service by becoming deaf or dumb, might yet not have received his *missio causaria* (discharge for an accidental reason). A testament made by him in the interval between his

loss of capacity and his discharge would be considered entitled to all the privileges of a military testament.

3. Sed hactenus hoc illis a principalibus constitutionibus conceditur, quatenus militant et in castris degunt: post missionem vero veterani vel extra castra si faciant adhuc militantes testamentum, communi omnium civium Romanorum jure facere debent. Et quod in castris fecerint testamentum non communi jure, sed quomodo voluerint, post missionem intra annum tantum valebit. Quid igitur, si intra annum quidem decesserit, condicio autem heredi adscripta post annum extiterit? An quasi militis testamentum valeat? Et placet, valere quasi militis.

3. This privilege is only granted by the imperial constitutions to military men, as long as they are on service, and live in the camp. Therefore, veterans after their discharge, or soldiers not in the camp, can only make their testaments by observing the forms required of all Roman citizens. And if a testament is made in the camp, and the solemnities of the law are not observed, it will continue valid only for one year after discharge from the army. Suppose, therefore, a soldier should die within a year after his discharge, but the condition imposed on the heir should not be accomplished until after the year, would his testament be valid, as being in effect the testament of a soldier? We answer it would be so valid.

D. xxix. 1. 38.

A soldier enjoyed the privilege of making a military testament while his name was inscribed on the list of the army (*in numeris*), and it continued valid for a year after his name had been taken off, but this only provided he was not discharged *ignominiæ causâ*. (D. xxix. 1. 38. 1.) The doubt as to the validity of a military testament, containing a condition under the circumstances mentioned in the text, arose from the doctrine of Roman law that, when the institution of the heir was conditional, the operation of the testament dated from the accomplishment of the condition, not from the death of the testator. If, therefore, the soldier died within a year after he had quitted the service, but the condition was not accomplished until the year was expired, the testament did not, strictly speaking, take effect within the year; and therefore Justinian removes a difficulty which a rigorous adherence to the letter of the law suggested.

4. Sed et si quis ante militiam non jure fecit testamentum et miles factus et in expeditione degens resignavit illud et quædam adjecit sive detraxit vel alias manifesta est militis voluntas hoc valere volentis, dicendum est, valere testamentum quasi ex nova militis voluntate.

4. If a man, before becoming a soldier, has made his testament irregularly, and afterwards, while on service, opens it, and adds something or strikes something out, or in any other way makes his wish manifest that this testament should be valid, it must be pronounced to be so, as being, in effect, a new testament made by a soldier.

D. xxix. 1. 20. 1.

If the soldier manifested his intention of adhering to the dispositions of his old testament, this was as much a fresh expression of his wishes as if he had made a new testament. If he was

altogether silent on the subject, an informal testament made before his becoming a soldier was not valid, as it was necessary that there should be a positive declaration made while he was on service of his wish to make his testament valid as a military one.

5. Denique et si in adrogationem datus fuerit miles vel filiusfamilias emancipatus est, testamentum ejus quasi militis ex nova voluntate valet nec videtur capitis deminutione irritum fieri.

5. Further, if a soldier is given in arrogation, or, being a *filiusfamilias*, is emancipated, his testament is valid as though by a new expression of the wishes of a soldier; and is not considered as invalidated by the *capitis deminutio* he has undergone.

D. xxix. 1. 22, 23.

By the law of Rome every testament became void, *irritum*, by the testator, after its execution, suffering any of the three kinds of *capitis deminutio*. With soldiers it was otherwise; their testament was not invalidated by undergoing either of the two greater kinds of *deminutio*, if it was merely for an infraction of military law that they were condemned to a punishment involving either of these kinds of alteration of *status*. (D. xxviii. 3. 6. 6.) Nor was it ever invalidated by their undergoing the third and least kind. The will of the soldier was supposed to be exercised so as to declare his wish that the old testament should be valid (*quasi ex nova militis voluntate*); and in this case, it does not appear that any positive declaration of such a wish was necessary. His testament, made previous to his change of *status*, was effectual, to the fullest extent it could be, in the new position he occupied. The military testament made by a *paterfamilias* respecting his property became, after arrogation, an effectual disposition of his *castrense peculium;* and one made by a *filiusfamilias* respecting his *castrense peculium* became, after emancipation, an effectual disposition of all his property.

6. Sciendum tamen est, quod ad exemplum castrensis peculii tam anteriores leges quam principales constitutiones quibusdam quasi castrensia dederunt peculia, atque eorum quibusdam permissum erat etiam in potestate degentibus testari. Quod nostra constitutio latius extendens, permisit omnibus in his tantummodo peculiis testari quidem, sed jure communi: cujus constitutionis tenore perspecto licentia est nihil eorum, quæ ad præfatum jus pertinent, ignorare.

6. We may here observe, that, in imitation of the *castrense peculium*, both old laws and imperial constitutions have permitted certain persons to have a *quasi-castrense peculium*, and some of these persons have been permitted to dispose of this *peculium* by testament, although they were in the power of another. Our constitution has extended this permission to all, in regard, that is, to these kinds of *peculium*, but their testaments must be made with the ordinary formalities. By reading this constitution any one may learn all that relates to the privilege we have mentioned.

C. vi. 22. 12.

We must not suppose, from the expression *anteriores leges*, that the *peculium quasi-castrense* belongs to a time of law wher

leges were really made. It is even doubtful, as we have said before, whether the passages in which it is mentioned by Ulpian, the only writer before Constantine who is supposed to refer to it, are genuine. (See note on Tit. 9. 1.)

Eorum quibusdam. The right of disposing by testament of the *quasi-castrense peculium* had, before Justinian, been granted only to certain privileged classes, such as consuls and presidents of provinces, among those who were permitted to hold this kind of *peculium.* Justinian granted it to all. (C. iii. 28. 37; C. vi. 22. 12.)

It is to be observed, that soldiers had other testamentary privileges besides those mentioned in the text. They could institute as heirs persons who were generally incapacitated, such as those who had been *deportati*, or who were *peregrini.* (GAI. ii. 110.) They were not obliged formally to disinherit their children, if they knew that they had any (C. vi. 21. 9), their testament was not set aside as inofficious (C. iii. 28. 9), they could give more than three-fourths of their property in legacies (C. vi. 21. 12), they could die partly testate and partly intestate (D. xxix 1. 6), and could dispose of the inheritance by codicils (D. xxix. 1. 36. pr.). The succeeding Title will show how much they thus differed from ordinary citizens.

TIT. XII. QUIBUS NON EST PERMISSUM TESTAMENTA FACERE.

Non tamen omnibus licet facere testamentum. Statim enim hi, qui alieno juri subjecti sunt, testamenti faciendi jus non habent, adeo quidem ut, quamvis parentes eis permiserint, nihilo magis jure testari possint: exceptis his, quos antea enumeravimus et præcipue militibus, qui in potestate parentum sunt, quibus de eo, quod in castris adquisierint, permissum est ex constitutionibus principum testamentum facere. Quod quidem initio tantum militantibus datum est tam ex auctoritate divi Augusti quam Nervæ nec non optimi imperatoris Trajani; postea vero subscriptione divi Hadriani etiam dimissis militia, id est veteranis, concessum est. Itaque si quidem fecerint de castrensi peculio testamentum, pertinebit hoc ad eum, quem heredem reliquerint: si vero intestati decesserint, nullis liberis vel fratribus superstitibus, ad parentes eorum jure communi pertinebit. Ex hoc intellegere possumus, quod in castris adquisierit

The power of making a testament is not granted to every one. In the first place, persons in the power of others have not this right; so much so, that, although their ascendants give permission, still they cannot make a valid testament. We must except those whom we have already mentioned, and particularly *filiifamiliarum* who are soldiers, for the imperial constitutions have given them the power of bequeathing whatever they have acquired while on actual service. This permission was at first granted by the Emperors Augustus and Nerva, and the illustrious Emperor Trajan, to soldiers on service only; but afterwards it was extended by the Emperor Hadrian to veterans, that is, to soldiers who had received their discharge; and therefore, if a *filiusfamilias* disposes by testament of his *castrense peculium*, this *peculium* will belong to the person whom he makes his heir: but, if he dies intestate, without children or brothers, this *peculium* will then belong, according to the ordinary

miles, qui in potestate patris est, neque ipsum patrem adimere posse neque patris creditores id vendere vel aliter inquietare neque, patre mortuo, cum fratribus esse commune, sed scilicet proprium ejus esse id, quod in castris adquisierit, quamquam jure civili omnium, qui in potestate parentum sunt, peculia perinde in bonis parentum computantur, acsi servorum peculia in bonis dominorum numerantur: exceptis videlicet his, quæ ex sacris constitutionibus et præcipue nostris propter diversas causas non adquiruntur. Præter hos igitur, qui castrense peculium vel quasi castrense habent, si quis alius filiusfamilias testamentum fecerit, inutile est, licet suæ potestatis factus decesserit.

law of the *patria potestas*, to the person in whose power he is. We may hence infer, that whatever a soldier, although under power, has acquired while on service, cannot be taken from him even by his father, nor can his father's creditors sell it, or otherwise disturb the son in his possession, nor is he bound to share it with brothers upon the death of his father, but it remains his sole property, although, by the civil law, the *peculia* of all those who are in the power of ascendants are reckoned among the goods of their ascendants, exactly as the *peculium* of a slave is reckoned among the goods of his master; those goods excepted, which by the constitutions of the emperors, and especially by our own, are prevented, for different reasons, from being so acquired. With the exception, therefore, of those who have a *castrense* or *quasi-castrense peculium*, if any other *filiusfamilias* makes a testament, it is useless, although he becomes *sui juris* before his death.

D. xxviii. 1. 6; D. xxix. 1. 1; C. vi. 61. 3. 4; C. vi. 59. 11; D. xlix. 17. 10; D. xxxvii. 6. 1. 15; D. xxviii. 1. 19.

The first thing, says Gaius (ii. 114), which we have to inquire, if we wish to know whether a testament is valid, is whether the person who made it had the *testamenti factio*, that is, in this instance, had the right to take the part of testator in the making of a testament. To be able to do this he must have the *commercium;* and further, he must be *sui juris*, or otherwise, as he could have no property, he could have nothing to dispose of by testament. Every Roman citizen who was *sui juris* had the right of making a testament, and if he was capable of exercising his right, and made a formal testament, his testament was valid.

As to the persons incapacitated to make a will, see note on Tit. 10. 6.

The *filiusfamilias* could have no property independently of his father, and he could not dispose of the property he might have if he became *sui juris* by outliving his father, because a future interest would not pass by mancipation. This was a part of the public law (*testamenti factio non privati sed publici juris est*, D. xxviii. 1. 3), and could not be waived by the mere consent of a private individual. It required express enactment to alter the law, and it was so far altered as to permit a *filiusfamilias* to dispose by testament of a *castrense* or *quasi-castrense peculium.* (See paragr. 6. of preceding Title.) If, however, the possessor of the *peculium* did not dispose of it by testament, the head of the family took it, previously to the time of Justinian, not as heir *ab intestato*, but as lawful claimant of a *peculium*. For the possessor,

not having exercised the power the law gave him, was in the same position as if the law had never permitted such a disposition. Justinian deferred this claim of the head of the family, when the possessor of the *peculium* had left children or brothers. If he had not left any, the head of the family then took the *peculium;* whether in right of his headship, or as heir *ab intestato,* is a disputed point. We have, however, the authority of Theophilus in the paraphrase of this paragraph for supposing, that when Justinian in the text says he took it *jure communi,* it is meant that he took it by the right of *patria potestas,* and there seems no necessity for understanding the passage otherwise.

1. Præterea testamentum facere non possunt impuberes, quia nullum eorum animi judicium est; item furiosi, quia mente carent. Nec ad rem pertinet, si impubes postea pubes factus aut furiosus postea compos mentis factus fuerit et decesserit. Furiosi autem si per id tempus fecerint testamentum, quo furor eorum intermissus est, jure testati esse videntur, certe eo, quod ante furorem fecerint, testamento valente: nam neque testamenta recte facta neque aliud ullum negotium recte gestum postea furor interveniens peremit.

1. Persons, again, under the age of puberty cannot make a testament, because they have not the requisite judgment of mind, nor can madmen, for they are deprived of their senses. Nor does it make any difference that the former arrive at puberty, or the latter regain their senses, before they die. But if a madman makes a testament during a lucid interval, his testament is valid; and, of course, a testament which he has made before being seized with madness is valid, for subsequent madness can invalidate neither a previous testament duly made, nor any other previous act duly performed.

C. xxii. 22. 9; D. xxviii. 1. 20. 4.

In this and the succeeding paragraphs of this Title, instances are given of persons who have the right, but are not capable of exercising it. A testament made by a person incapable of exercising the right was not rendered valid by his subsequently becoming capable, nor one made by a person capable rendered invalid by his subsequently becoming incapable.

2. Item prodigus, cui bonorum suorum administratio interdicta est, testamentum facere non potest, sed id, quod ante fecerit, quam interdictio ei bonorum fiat, ratum est.

2. A prodigal also, who is interdicted from the management of his own affairs, cannot make a testament; but a testament made before such interdiction is valid.

D. xxviii. 1. 18.

3. Item mutus et surdus non semper facere testamentum possunt. Utique autem de eo surdo loquimur, qui omnino non exaudit, non qui tarde exaudit: nam et mutus is intellegitur, qui eloqui nihil potest, non qui tarde loquitur. Sæpe autem etiam litterati et eruditi homines variis casibus et audiendi et loquendi facultatem amittunt: unde nostra constitutio etiam his subvenit, ut certis casibus et modis secundum normam ejus possint testari aliaque

3. Again, a deaf or a dumb person is not always capable of making a testament: by deaf, we mean one who is so deaf as to be unable to hear at all, not one who hears with difficulty; and by dumb, we mean a person who cannot speak at all, not one who merely speaks with difficulty. For it often happens, that even learned and erudite men lose by various accidents the faculty of hearing and speaking. Our constitution, therefore, comes to their aid, and permits them, in certain cases,

facere, quæ eis permissa sunt. Sed si quis post testamentum factum valetudine aut quolibet alio casu mutus aut surdus esse cœperit, ratum nihilo minus ejus remanet testamentum.

and with certain forms, to make testaments, and do many other acts, according to the rules therein laid down. But if any one, after making his testament, becomes deaf or dumb by reason of ill health or any other accident, his testament remains valid notwithstanding.

C. vi. 22. 10; D. xxviii. 1. 6. 1.

The constitution referred to (C. vi. 22. 10) permits a testament to be made by any deaf or dumb person not physically incapable of making one, i.e. by any one not deaf and dumb from birth.

4. Cæcus autem non potest facere testamentum nisi per observationem, quam lex divi Justini patris mei introduxit.

4. A blind man, again, cannot make a testament except by observing the forms which the law of the Emperor Justin, our father, has introduced.

C. vi. 22. 8.

Justin, besides the seven witnesses ordinarily necessary, required in the case of a testament made by a blind man, whether blind through illness or from birth, that a notary (*tabularius*) should be present, or else an eighth witness, if a notary could not be found, who should either write at the dictation of the blind man, or read aloud to him a testament previously prepared. (C. vi. 22. 8.) But in this Justin only regulated and did not originate the testaments of the blind; they seem to have been always allowed.

5. Ejus, qui apud hostes est, testamentum, quod ibi fecit, non valet, quamvis redierit: sed quod, dum in civitate fuerat, fecit, sive redierit, valet jure postliminii, sive illic decesserit, valet ex lege Cornelia.

5. The testament of a captive in the power of an enemy is not valid, if made during his captivity, even although he subsequently returns. But a testament made while he was still in his own state is valid, either by the *jus postliminii*, if he returns, or by the *lex Cornelia*, if he dies in captivity.

D. xlix. 15. 18.

A captive was incapacitated from performing, during his captivity, any act good in law; and thus, though his right to make a testament was not lost, but only suspended, he was incapable, while a captive, of exercising the right. But if he had exercised it before his captivity, the testament was valid, whether he returned to his country or not. If he did return, the right not having been lost, and having been once duly exercised, the testament was valid *jure postliminii*. If he did not return, but died in captivity, it was still valid, as he was supposed, by a fiction of law, to have died at the moment when he was made captive, and so before his captivity had begun. This fiction was introduced by a rather strained construction of the terms of the *lex Cornelia de falsis* (B.C. 81), which provided that the same penalty should attach to the forgery of a testament of a person dying in captivity

as to that of a testament made by a person dying in his own country. It was argued that the law could never have intended to attach a penalty to the forgery of a testament which was invalid. If it was valid, it could only be so by treating it as if made by a person who had not died in captivity, and whose right was not suspended at the time of his death. For it was necessary that a person should have the right of making a testament, not only at the time when he made it, but also at the moment of his death; but in this we must distinguish between the right to make a testament, and the capacity of exercising that right; for the loss of capacity to make a testament did not, as we have seen, affect a testament made by one capable at the time of making it. This favourable interpretation of the *lex Cornelia* (*beneficium legis Corneliæ*) (PAUL. *Sent.* iii. 4. 8) was gradually extended, so as to embrace every branch of law, such as tutorship, heirship, &c., to which it could be made applicable. *In omnibus partibus juris is qui reversus non est ab hostibus quasi tunc decessisse videtur cum captus est.* (D. xlix. 15. 18.)

TIT. XIII. DE EXHEREDATIONE LIBERORUM.

Non tamen, ut omnimodo valeat testamentum, sufficit hæc observatio, quam supra exposuimus. Sed qui filium in potestate habet, debet curare, ut eum heredem instituat vel exheredem nominatim faciat: alioquin si eum silentio præterierit, inutiliter testabitur, adeo quidem ut, etsi vivo patre filius mortuus sit, nemo ex eo testamento heres existere possit, quia scilicet ab initio non constiterit testamentum. Sed non ita de filiabus vel aliis per virilem sexum descendentibus liberis utriusque sexus fuerat antiquitati observatum; sed si non fuerant heredes scripti scriptæve vel exheredati exheredatæve, testamentum quidem non infirmabatur, jus autem adcrescendi eis ad certam portionem præstabatur. Sed nec nominatim eas personas exheredare parentibus necesse erat, sed licebat et inter ceteros hoc facere.

The observance of the rules already laid down is not, however, all that is required to make a testament altogether valid. A person who has a son in his power must take care either to institute him his heir, or to disinherit him by name, for if he passes him over in silence, his testament will be of no effect; so much so, that even if the son dies while the father is alive, yet no one can be heir under the testament, because it was void from the beginning. But the ancients did not observe this rule with regard to daughters, or to other descendants, through the male line, of either sex; for although these were neither instituted heirs nor disinherited, yet the testament was not invalidated, only they had a right of joining themselves with the instituted heirs so as to receive a specified portion of the inheritance. Ascendants were not obliged to disinherit them by name, but might include them in the term *ceteri*.

GAI. ii. 115. 123, 124, 127.

The power of making a testament was a derogation of the strict law regulating the devolution of the property of deceased persons. Of those whose claims a citizen *sui juris* was permitted thus to set aside, the first and most important class was that of what were called the *sui heredes*, that is, persons in the power of the testator, but becoming *sui juris* by the testator's death, whose 'own'

the inheritance was said to be in consequence of their position in the family. (See Introd. sec. 77.) They were necessarily either children, natural or adoptive, of the testator, or his descendants in the male line, and their position in the testator's family, together with their claim to his property if he died intestate, was considered to entitle them to have an express declaration of his intention from a testator who wished to use his power of depriving them of the inheritance. We have already seen, in the case of the *castrense peculium* (Tit. 12. pr.), that when the law permitted an exception to a general rule of law, unless advantage was taken of the exception, the general rule prevailed. So here, unless the testator expressly took advantage of his power of disinheriting the *sui heredes*, the general rule that they succeeded to him prevailed. The law would not permit his intention to disinherit them to be inferred from his silence, thus drawing a distinction in their favour as compared with the other classes of persons who might inherit *ab intestato*.

In order, therefore, as the text informs us, to disinherit a son, it was necessary that he should be referred to by name, or in a special and unmistakable manner, as *Titius filius meus exheres esto*, or, in case of an only son, *filius meus exheres esto*. But daughters and the descendants of sons (those of daughters would not, of course, be members of the family at all) might be disinherited by the general clause *ceteri exheredes sunto*. Whenever a person existed at the time the will was made, to disinherit whom it was necessary to refer to him by name, but who was passed over altogether, the whole testament was entirely bad, and the testator was considered to die intestate. Nor was the testament made valid by this person ceasing to exist before the death of the testator, although this was a point not established in the time of Gaius (ii. 123). If a person existed at the time of making the testament, to disinherit whom it was only necessary the general clause should be employed, the testament which did not contain this was good, but the person, if the heir named and instituted in the testament was among the *sui heredes*, took a *pars virilis* of the inheritance, that is, was joined so as to make one more heir and one more equal sharer in the inheritance (*jus accrescendi*): if the heirs instituted were strangers, the person took one-half the inheritance. *Scriptis heredibus adcrescunt, suis quidem heredibus in partem virilem, extraneis autem in partem dimidiam.* (ULP. *Reg.* 22. 17.)

1. Nominatim autem exheredari quis videtur, sive ita exheredetur 'Titius filius meus exheres esto,' sive ita 'filius meus exheres estò' non adjecto proprio nomine, scilicet si alius filius non extet. Postumi quoque liberi vel heredes institui debent vel exheredari. Et in eo par omnium condicio est, quod et

1. A child is disinherited by name, if the words used are 'Let Titius my son be disinherited,' or thus, 'Let my son be disinherited,' without the addition of a proper name, in case the testator has no other son. Posthumous children, too, must either be instituted heirs, or disinherited; and the condition of all such children is

in filio postumo et in quolibet ex ceteris liberis sive feminini sexus sive masculini præterito valet quidem testamentum, sed postea adgnatione postumi sive postumæ rumpitur et ea ratione totum infirmatur: ideoque si mulier, ex qua postumus aut postuma sperabatur, abortum fecerit, nihil impedimento est scriptis heredibus ad hereditatem adeundam. Sed feminini quidem sexus personæ vel nominatim vel inter ceteros exheredari solebant, dum tamen, si inter ceteros exheredentur, aliquid eis legetur, ne videantur per oblivionem præteritæ esse, masculos vero postumos, id est filium et deinceps, placuit non aliter recte exheredari, nisi nominatim exheredentur, hoc scilicet modo: 'quicumque mihi filius genitus fuerit, exheres esto'.

equal in this, that if a posthumous son, or any posthumous descendant of either sex, is passed over, the testament is still valid; but, by the subsequent agnation of a posthumous child of either sex, its force is broken, and it becomes entirely void. And therefore, if a woman from whom a posthumous child is expected, should miscarry, there is nothing to hinder the instituted heirs from entering upon the inheritance. Posthumous females were usually disinherited either by name, or by using the general term *ceteri*. If, however, they are disinherited by using the general term, something must be left them as a legacy to show that they were not passed over through forgetfulness. But male posthumous children, i.e. sons, and other descendants, cannot be disinherited except by name, that is, in this form, 'Whatever son is hereafter born to me, let him be disinherited'.

D. xxviii. 2. 1, 2, 4 *et seq.*

In the strictness of the old civil law, a child born after the death of the testator (*postumus*) was incapable of being instituted. He had not, at the time of the testator's death, any certain existence: and the law said, *Incerta persona heres institui non potest.* (ULP. *Reg.* 22. 4.) But still it might be that the child, when born, was a *suus heres* of the testator; and as his *agnatio* would be considered in law to date from the time of conception, not birth, the testator would pass over one of his *sui heredes* if he omitted to include him or exclude him in the testament; although, if he had included him, the posthumous child could not have taken anything. In the course of time the law permitted the posthumous child, if a *suus heres*, to be instituted as an heir; but the civil law never permitted the posthumous child of a stranger, i.e. a child born after the death of the testator, to be instituted. The prætor, however, gave him *bonorum possessio*, and Justinian permitted such persons to be instituted. (Bk. iii. Tit. 9. pr.) And thus the institution of a posthumous *suus heres* having once been permitted, the next step was to consider it imperative on the testator, if he wished to exclude the posthumous child from a share in the inheritance, to do so in the case of a son by referring to him specially (*nominatim* does not, of course, here mean 'by name,' but by a phrase expressly referring to him, such as *postumus exheres esto*), and in the case of a daughter, or any descendant other than a son, by adopting the general clause of disinheritance, *ceteri exheredes sunto*, and also by giving the child some legacy, however trifling, in order to show that it was not by accident that the testator allowed this clause to embrace the case of a posthumous child.

The jurist Gallus Aquilius, who lived towards the end of the Republic, invented a form of institution by which the case was

provided for of a son dying in the testator's lifetime, and then the testator dying, and then there being born a posthumous son of the son, who would of course be a *suus heres* of the testator. (D. xxviii. 2. 29. pr.)

2. Postumorum autem loco sunt et hi, qui in sui heredis locum succedendo quasi adgnascendo fiunt parentibus sui heredes. Ut ecce si quis filium et ex eo nepotem neptemve in potestate habeat, quia filius gradu præcedit, is solus jura sui heredis habet, quamvis nepos quoque et neptis ex eo in eadem potestate sunt: sed si filius ejus vivo eo moriatur aut qualibet alia ratione exeat de potestate ejus, incipit nepos neptisve in ejus locum succedere et eo modo jura suorum heredum quasi adgnatione nanciscuntur. Ne ergo eo modo rumpatur ejus testamentum, sicut ipsum filium vel heredem instituere vel nominatim exheredare debet testator, ne non jure faciat testamentum, ita et nepotem neptemve ex filio necesse est ei vel heredem instituere vel exheredare, ne forte, vivo eo filio mortuo, succedendo in locum ejus nepos neptisve quasi adgnatione rumpant testamentum. Idque lege Junia Velleia provisum est, in qua simul exheredationis modus ad similitudinem postumorum demonstratur.

2. Those ought also to be placed on the footing of posthumous children, who, succeeding in the place of a *suus heres*, become by quasi-agnation *sui heredes* of their ascendants. Thus, for instance, if any one has a son in his power, and by him a grandson or granddaughter, the son, being first in degree, has alone the rights of a *suus heres*, although the grandson or granddaughter by that son is under the same parental power. But, if the son should die in his father's lifetime, or should by any other means cease to be under his father's power, the grandson or granddaughter would succeed in his place, and would thus, by quasi-agnation, obtain the rights of a *suus heres*. In order, then, that the force of his testament may not be broken, the testator, who is, as we have said, obliged, in order to make an effectual testament, to institute his son as heir, or to disinherit him by name, is equally obliged to institute as heir, or to disinherit, a grandson or granddaughter by that son, lest, if, during his lifetime, his son should die, and the grandson or granddaughter succeed in his place, the force of the testament may be broken by quasi-agnation. Provision has been made for this by the *lex Junia Velleia*, in which is given a mode of disinheriting in such a case like that of disinheriting posthumous children.

GAI. ii. 134.

A testament was made void, not only by the birth of a posthumous *suus heres*, but by any one coming into the position of a *suus heres* after the time when the testament was made. The testator might (under the ancient law) have subsequently married a wife *in manu;* an emancipated son might come again into his father's power; a captive son might return home; or the testator might adopt a person into his family. In all these cases, as well as in that mentioned in the text, the testament would be invalidated by a process which bore a close analogy to agnation, that is, by these persons becoming, otherwise than by birth, the *sui heredes* of the testator, just as it would be by direct agnation, if a son was born to the testator after the date of the testament. The *lex Junia Velleia* (GAI. ii. 134), passed in the time of Augustus (A.D. 11), provided (1st) that a testator might institute or exclude any one

conceived before the date of the testament who should, after the date of the testament, be born his *suus heres* in his lifetime, thus giving a new signification to *postumus* (ULP. *Reg.* xxii. 19), and (2ndly) that he might exclude a grandchild, or other descendant, born before the date of the testament, who might, if the son of the testator died in the testator's lifetime, step into the place of his father, and became a *suus heres* during the testator's lifetime. Previously such a person could not have been excluded in his capacity of *suus heres*, for at the date of the testament he was not in that position, which he only attained subsequently. He could have been instituted before the *lex Junia Velleia*, for he was an existing person, and therefore not a *persona incerta*; but when he became a *suus heres*, as it was not in this character that he had been instituted, the testament would have been broken but for the *lex Junia Velleia*. (D. xxvii. 2. 29. 11 to end.) If persons, coming under the *lex Junia Velleia*, were excluded, the *lex Junia* required that, as in the case of posthumous *sui heredes*, the males should be excluded *nominatim*, and the females *inter ceteros*, but with a legacy. In the case of the testator having subsequently a child not conceived when the testament was made and born in the testator's lifetime, and in the cases of quasi-agnation mentioned above, no law helped the testator, and he had to make a new testament in order to die testate. Commentators term persons coming under the first head above mentioned *postumi Velleiani*, and persons coming under the second head *quasi postumi Velleiani*. (DEMANGEAT, i. 619.)

3. Emancipatos liberos jure civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes. Sed prætor omnes tam feminini sexus quam masculini, si heredes non instituantur, exheredari jubet, virilis sexus nominatim, feminini vero et inter ceteros. Quodsi neque heredes instituti fuerint neque ita, ut diximus, exheredati, promittit prætor eis contra tabulas testamenti bonorum possessionem.

3. The civil law does not make it necessary either to institute emancipated children heirs, or to disinherit them in a testament; because they are not *sui heredes*. But the prætor orders, that all children, male or female, if they are not instituted heirs, shall be disinherited; the males by name, the females by name or under the general term *ceteri*: for if they have neither been instituted heirs, nor disinherited in manner before mentioned, the prætor gives them possession of goods *contra tabulas*.

GAI. ii. 135.

An emancipated child, passing out of the testator's family, ceased to be his *suus heres*. But though he thus lost all legal claim upon the testator's inheritance, yet he had gained no provision by being emancipated, and the prætor, therefore, came to his relief, and set aside the testament, if he had not been expressly excluded. He did not do this nominally, for the testament was legally good, but he did what amounted to the same thing: he divided the property equally among all as if the testator had died intestate, giving the children what was termed 'possession of the goods'; a possession said, in this case, to be *contra tabulas*, as it

overthrew the provisions contained in the tablets of the testament. The emancipated son, however, had to bring into account the property he had acquired since emancipation, if the effect of his getting the testament set aside was injurious to the properly instituted *suus heres*. The properly instituted *suus heres* might, for example, have had only a quarter of the inheritance left him, and then he would gain, not lose, by the emancipated son getting the testament set aside and sharing the inheritance with him. (D. xxxvii. 4. 13.) An emancipated daughter might, under the prætorian system, be in a better position than an unemancipated, if both were passed over, and might in effect be in as good a position as the male *suus heres* who was passed over. For if the emancipated daughter was passed over, the testament would be overthrown altogether, and she would, if an only child, take all the property; whereas, if the unemancipated daughter was passed over, she could only take half at most. Antoninus (either Antoninus Pius or Marcus Aurelius) put them on an equality, by giving the emancipated only the share she would have had, had she not been emancipated. (GAI. ii. 125, 126.)

The old civil law permitted grandsons, not in the immediate power of the testator, to be disinherited by the general *ceteri* clause. The prætor required them to be disinherited *nominatim*. (GAI. ii. 129.) Further, whereas in the initiatory section we have been told that the testament was wholly void if a son passed over died in the lifetime of his father, and Gaius tells us that this was the opinion of the Sabinians, yet there are passages which seem to show that the prætors sometimes upheld a contrary rule. (D. xxxvii. 11. 2. pr.; D. xxviii. 3. 17.)

4. Adoptivi liberi quamdiu sunt in potestate patris adoptivi, ejusdem juris habentur, cujus sunt justis nuptiis quæsiti: itaque heredes instituendi vel exheredandi sunt secundum ea, quæ de naturalibus exposuimus: emancipati vero a patre adoptivo neque jure civili neque quod ad edictum prætoris attinet, inter liberos numerantur. Qua ratione accidit, ut ex diverso quod ad naturalem parentem attinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur, ut eos neque heredes instituere neque exheredare necesse sit. Cum vero emancipati fuerint ab adoptivo patre, tunc incipiunt in ea causa esse, in qua futuri essent, si ab ipso naturali patre emancipati fuissent.

4. Adoptive children, while under the power of their adoptive father, are in the same legal position as children sprung from a legal marriage; and therefore they must either be instituted heirs or disinherited, according to the rules we have laid down respecting natural children. But neither by the civil nor the prætorian law are such children, if emancipated by their adoptive father, reckoned among his natural children. On this principle it is that, conversely, adoptive children, while in their adoptive family, are considered strangers to their natural father, who need not institute them heirs or disinherit them; but if they are emancipated by their adoptive father, they then begin to be in the same position in which they would have been if emancipated by their natural father.

GAI. ii. 136, 137.

If an adopted son was emancipated by his adoptive father, he would, under the old law, have no legal claim on the inheritance of his adoptive or his natural father. But the prætor came to his

aid, and gave him 'possession of the goods' of his natural father unless he was expressly excluded by his natural father's testament. On his adoptive father he would, after emancipation, in no case have any claim whatever; until Justinian altered the law in the manner referred to in the next paragraph.

5. Sed hæc vetustas introducebat. Nostra vero constitutio inter masculos et feminas in hoc jure nihil interesse existimans, quia utraque persona in hominum procreatione similiter naturæ officio fungitur et lege antiqua duodecim tabularum omnes similiter ad successiones ab intestato vocabantur, quod et prætores postea secuti esse videntur, ideo simplex ac simile jus et in filiis et in filiabus et in ceteris descendentibus per virilem sexum personis non solum natis, sed etiam postumis introduxit, ut omnes, sive sui sive emancipati sunt, aut heredes instituantur aut nominatim exheredentur et eundem habeant effectum circa testamenta parentum suorum infirmanda et hereditatem auferendam, quem filii sui vel emancipati habent, sive jam nati sunt sive adhuc in utero constituti, postea nati sunt. Circa adoptivos autem certam induximus divisionem, quæ constitutione nostra, quam super adoptivis tulimus, continetur.

5. Such was the ancient law. But, thinking that no distinction can reasonably be made between the two sexes, inasmuch as they equally contribute to the procreation of the species, and because, by the ancient law of the Twelve Tables, all children were equally called to the succession *ab intestato*, which law the prætors seem afterwards to have followed, we have by our constitution made the law the same both as to sons and daughters, and also as to all other descendants in the male line, whether already born or posthumous; so that all children, whether they are *sui heredes* or emancipated, must either be instituted heirs or be disinherited by name, and their omission has the same effect in making void the testaments of their ascendants, and taking away the inheritance from the instituted heirs, as would be produced by the omission of sons who were *sui heredes* or emancipated, whether they have been already born, or having been already conceived are born afterwards. With respect to adoptive sons, however, we have established a distinction between them, which is set forth in our constitution on adoptive persons.

C. vi. 28. 4; C. viii. 47. 10. pr. and 1.

Under the legislation of Justinian a testament would be rendered invalid by the omission of any one male or female whom it was necessary either to institute or exclude, and every exclusion must be made *nominatim*. An adopted son, if adopted by a stranger, i.e. not an ascendant, lost none of his claims upon his natural father's property, but only had a claim upon that of his adoptive father if the latter died intestate; for if the adoptive father made a testament, it was not necessary he should notice the adoptive son. But an adopted son, if adopted by an ascendant, either a maternal grandfather or an emancipated father (see Bk. i. Tit. 11. 2), stood in the position of a *suus heres* to the ascendant, and a testament made by such ascendant would be invalid in which he was passed over.

6. Sed si expeditione occupatus miles testamentum faciat et liberos suos jam natos vel postumos nominatim non exheredaverit, sed silentio præterierit, non ignorans, an

6. If a soldier on active service makes his testament, and neither disinherits his children already born, nor his posthumous children by name, but passes them over in silence, pro-

habeat liberos, silentium ejus pro exheredatione nominatim facta valere constitutionibus principum cautum est.

vided he is not ignorant whether he has children, it is provided by the constitutions of the emperors, that his silence shall be equivalent to disinheriting them by name.

C. vi. 21. 9 ; D. xxix. 1. 7.

7. Mater vel avus maternus necesse non habent liberos suos aut heredes instituere aut exheredare, sed possunt eos omittere. Nam silentium matris aut avi materni ceterorumque per matrem ascendentium tantum facit, quantum exheredatio patris. Neque enim matri filium filiamve neque avo materno nepotem neptemve ex filia, si eum eamve heredem non instituat, exheredare necesse est, sive de jure civili quæramus, sive de edicto prætoris, quo præteritis liberis contra tabulas bonorum possessionem promittit. Sed aliud eis adminiculum servatur, quod paulo post vobis manifestum fiet.

7. Neither a mother nor a maternal grandfather need either institute children as heirs, or disinherit them, but may pass them over in silence; for the silence of a mother or a maternal grandfather, or of any other ascendant on the mother's side, has the same effect as a father disinheriting them. For a mother is not obliged to disinherit her children, if she does not institute them her heirs; neither is a maternal grandfather under the necessity of instituting or of disinheriting his grandson or granddaughter by a daughter; whether we look to the civil law, or the edict of the prætor, by which he promises possession of goods *contra tabulas* to those children who have been passed over in silence. But children, in this case, have another remedy, which we will hereafter explain to you.

GAI. iii. 71.

The children could never be the *sui heredes* of their mother, for women never had any one in their power; nor could they be the *sui heredes* of a maternal ascendant, except by adoption, and the case of adoption is not spoken of here.

Aliud adminiculum. This refers to the action for setting aside the testament as inofficious, that is, made without proper regard for natural ties. (See Tit. 18.)

TIT. XIV. DE HEREDIBUS INSTITUENDIS.

Heredes instituere permissum est tam liberos homines quam servos tam proprios quam alienos. Proprios autem olim quidem secundum plurium sententias non aliter quam cum libertate recte instituere licebat. Hodie vero etiam sine libertate ex nostra constitutione heredes eos instituere permissum est. Quod non per innovationem induximus, sed quoniam et æquius erat et Atilicino placuisse Paulus suis libris, quos tam ad Masurium Sabinum quam ad Plautium scripsit, refert. Proprius

A man may institute as his heirs either freemen or slaves, and either his own slaves or those of another. Formerly, according to the more received opinion, no one could properly institute his own slaves, unless he also freed them; but now, by our constitution, a testator may institute his slave without expressly enfranchising him. And we have introduced this rule, not as an innovation, but because it seemed equitable; and Paulus, in his writings on Masurius Sabinus and Plautius, informs us that this was the opinion

autem servus etiam is intellegitur, in quo nudam proprietatem testator habet, alio usumfructum habente. Est autem casus, in quo nec cum libertate utiliter servus a domina heres instituitur, ut constitutione divorum Severi et Antonini cavetur, cujus verba hæc sunt: 'Servum adulterio maculatum non jure testamento manumissum ante sententiam ab ea muliere videri, quæ rea fuerat ejusdem criminis postulata, rationis est: quare sequitur, ut in eundem a domina collata institutio nullius momenti habeatur'. Alienus servus etiam is intellegitur, in quo usumfructum testator habet.

of Atilicinus. Among a testator's own slaves is included one in whom the testator has only a bare ownership, another having the usufruct. But there is a case, in which the institution of a slave by his mistress is void, although his liberty is expressly given to him, according to the provisions of a constitution of the Emperors Severus and Antoninus, in these words: 'Reason demands that a slave, accused of adultery with his mistress, shall not be allowed, before sentence is pronounced, to be made free by the testament of the mistress who is alleged to be a partner in the crime. Whence it follows that if a mistress institutes such a slave as her heir, it is of no avail.' In the term, 'the slave of another,' is included a slave of whom the testator has the usufruct.

GAI. ii. 185-187; C. vi. 27. 5; C. vii. 15. 1; D. xxviii. 5. 48. 2.

By institution is meant the declaration who is to be heir, that is, who is to carry on the legal existence, the *persona*, of the testator. And as, unless his existence was continued, there could be no thing or person from whom the testamentary dispositions could derive any force, or be of any efficacy, the institution was the all-important part of the testament. It was *veluti caput atque fundamentum totius testamenti*. All other dispositions were accessories to it, being only conditions or laws imposed upon the heir. In the older law a peculiar form of words was appropriated to the institution. '*Titius heres esto*' was the recognised form. Even in the days of Gaius and Ulpian (GAI. ii. 116, 117; ULP. *Reg.* 21), such expressions as '*Titius heres sit*,' '*Titium heredem esse jubeo*,' terms of command, were considered right, and expressions such as '*Titium heredem esse volo*,' '*heredem instituo*,' '*heredem facio*,' were considered wrong. And it was not till 339 A.D. that Constantine the Second permitted the institution to be made in any terms by which the meaning of the testator could be clearly ascertained. (C. vi. 23. 15.) Again, in the older law, as everything else in the testament derived its force from the institution, it was considered that the institution ought to be put at the head or top of the testament, and any legacy or other disposition placed before it was passed over, and had no effect. An exception was made in behalf of an appointment of a tutor (see Bk. i. Tit. 14. 3.); and the clause in which the testator disinherited his *sui heredes* was naturally placed before that in which he instituted testamentary heirs. Justinian, as we shall see in Title 20. 34, enacted that, provided the institution appeared in some part of the testament, it should be immaterial in what part it might be placed.

Any one, as has been said above, might be instituted, and consequently take as heir, who had the rights of a citizen, or who as it was technically termed, had the *testamenti factio cum testatore*, i.e. the power of joining with the testator in going through the ceremonies of the *jus Quiritium*. As to the different grounds of incapacity to take under a will, see note on Tit. 10. 6.

If a person instituted his own slave, this was held to give the slave his liberty by necessary implication. If he instituted the slave of another, the slave took the inheritance for his master's benefit, provided the master had the *testamenti factio* with the testator; but if he had not, the institution of the slave was void.

In the law before Justinian, enfranchisement by a person who had only a bare property in a slave, was not held to confer freedom, *a proprietatis domino manumissus liber non fit, sed servus sine domino est.* (ULP. *Reg.* 1. 19.) Under Justinian the slave became free, and could acquire for himself, and could take as heir; but he was obliged to serve as slave to the usufructuary, during such time as the usufruct continued.

The slave accused of adultery with his mistress might be subjected, as all slaves might, to the torture, to extract evidence of his guilt. If he had been enfranchised, he would have escaped this, and thus the mistress who died before sentence was pronounced, as, for example, by suicide, might have defeated justice, as against the slave, unless she had been restrained from using her power of enfranchising him by her testament.

1. Servus autem a domino suo heres institutus, si quidem in eadem causa manserit, fit ex testamento liber heresque necessarius. Si vero a vivo testatore manumissus fuerit, suo arbitrio adire hereditatem potest, quia non fit necessarius, cum utrumque ex domini testamento non consequitur. Quodsi alienatus fuerit, jussu novi domini adire hereditatem debet et ea ratione per eum dominus fit heres: nam ipse alienatus neque liber neque heres esse potest, etiamsi cum libertate heres institutus fuerit: destitisse etenim a libertatis datione videtur dominus, qui eum alienavit. Alienus quoque servus heres institutus si in eadem causa duraverit, jussu domini adire hereditatem debet. Si vero alienatus fuerit aut vivo testatore aut post mortem ejus, antequam adeat, debet jussu novi domini adire. At si manumissus est vivo testatore vel mortuo, antequam adeat, suo arbitrio adire hereditatem potest.

1. A slave instituted heir by his master, if he remains in the same condition, becomes, by virtue of the testament, free and necessary heir. But, if his master has enfranchised him before dying, he may at his pleasure accept or refuse the inheritance, for he does not become a necessary heir, since he does not obtain both his liberty and the inheritance by the testament of his master. But, if he has been alienated, he must enter on the inheritance at the command of his new master, who thus through his slave becomes the heir of the testator. For a slave once alienated cannot gain his liberty or himself take an inheritance by virtue of the testament of the master who alienated him, although his freedom was expressly given by the testament; because a master who has alienated his slave, has shown that he has renounced the intention of enfranchising him. So, too, when the slave of another is appointed heir, if he remains in slavery, he must take the inheritance at his master's bidding; and, if the slave is alienated in the lifetime of the testator, or after his death, but before he

has actually taken the inheritance, it is at the command of his new master that he must accept it. But, if he is enfranchised during the lifetime of the testator, or after his death, and before he has accepted the inheritance, he may enter upon the inheritance or not, at his own option.

GAI. ii. 188, 189.

It was necessary that the heir, as being the person who carried on the legal existence of the testator, should be possessed of civil rights. If, then, a slave of the testator was instituted, as it was in the power of the testator to make him free, and he had invested him with a character requiring freedom, this institution was considered to involve his freedom. The slave of any one else, if instituted, was only a channel by which his master, if possessed of civil rights, acquired the inheritance. (See Bk. i. Tit. 6. 1.) If a slave of the testator was instituted his heir, and remained his slave at the time of the testator's death, the slave, immediately upon the testator dying, became his *heres necessarius*, that is, became his heir without any option of refusing or taking the inheritance. But if it was given under any condition, and the condition failed, the institution then became invalid.

If the slave instituted did not belong to the testator at the time of the testator's death, his condition at the time of his taking on him the inheritance (*aditio hereditatis*) determined for whom the inheritance was acquired. If at that time he was a slave, he acquired it for the person who was then his master; if free, for himself.

Disposing of the slave to another revoked the gift of liberty, because this was considered as a legacy, a mere accessory to the inheritance, to revoke which anything was sufficient, which showed a change of intention on the part of the testator; but it did not revoke the institution, because this was the keystone of the testament, and could only be revoked by a new testament, or destruction of the old one.

2. Servus alienus post domini mortem recte heres instituitur, quia et cum hereditariis servis est testamenti factio: nondum enim adita hereditas personæ vicem sustinet, non heredis futuri, sed defuncti, cum et ejus, qui in utero est, servus recte heres instituitur.

2. The slave of another may be instituted heir even after the death of his master, as there is *testamenti factio* with slaves belonging to an inheritance; for an inheritance not yet entered on represents the person of the deceased, and not that of the future heir. So, too, the slave even of a child in the womb may be properly instituted heir.

D. xxviii. 5. 31. 1; D. xxviii. 5. 64.

After the death of a testator, and before the inheritance was entered on, the inheritance itself represented the person of the deceased, as it did that of an unborn child until the birth. A slave, during this interval, was said to belong to the inheritance,

and if a testament was made by any one instituting as heir a slave belonging to the inheritance, the slave took the inheritance thus given him for the benefit of that inheritance to which he belonged. And that he should do so, it was not necessary that the person by whose testament he was instituted heir should have *testamenti factio* with the future heir, but it was only necessary that he should have it with the person to whose inheritance the slave belonged.

3. Servus plurium, cum quibus testamenti factio est, ab extraneo institutus heres, unicuique dominorum, cujus jussu adierit, pro portione dominii adquirit hereditatem.

3. If a slave belonging to several masters, with all of whom there is *testamenti factio*, is instituted heir by a stranger, he acquires a proportion of the inheritance for each master by whose command he took it, corresponding to the several interests they each have in him.

D. xxix. 2. 67, 68.

If the slave was instituted heir by one of his masters, then, if this master expressly gave him his freedom, he became the *heres necessarius* of the master instituting him, and free; a due proportion of the price at which he was valued being paid to each of his other masters. But if his liberty was not expressly given him, the share which the testator had in him accrued proportionately to all those of his masters by whose orders he entered on the inheritance. (See Tit. 7. 4 of this Book.)

4. Et unum hominem et plures in infinitum, quot quis velit, heredes facere licet.

5. Hereditas plerumque dividitur in duodecim uncias, quæ assis appellatione continentur. Habent autem et hæ partes propria nomina ab uncia usque ad assem, ut puta hæc: uncia, sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextans, deunx, as. Non autem utique duodecim uncias esse oportet. Nam tot unciæ assem efficiunt, quot testator voluerit, et si unum tantum quis ex semisse verbi gratia heredem scripserit, totus as in semisse erit: neque enim idem ex parte testatus et ex parte intestatus decedere potest, nisi sit miles, cujus sola voluntas in testando spectatur. Et e contrario potest quis in quantascumque voluerit plurimas uncias suam hereditatem dividere.

4. A testator may appoint one heir or several, the number being quite unrestricted.

5. An inheritance is generally divided into twelve ounces, comprehended together under the term of an *as*, and each of these parts, from the ounce to the *as*, has its peculiar name, viz. *uncia*, *sextans*, *quadrans*, *triens*, *quincunx*, *semis*, *septunx*, *bes*, *dodrans*, *dextans*, *deunx*, *as*. But it is not necessary that there should be always twelve ounces, for an *as* may consist of as many ounces as the testator pleases. If, for example, a man names but one heir, and appoints him *ex semisse*, i.e. the heir of six parts, then these six parts will make up the whole *as;* for no one can die partly testate and partly intestate, except a soldier, whose intention in making his testament is alone regarded. Conversely, a testator may divide the inheritance into as many ounces more than twelve as he thinks proper.

D. xxvii. 5. 50. 2; D. xxviii. 5. 13. 1 *et seq.;* D. xxix. 1. 6.

In making a testament, where the testator wished to give different shares to his heirs, the singular system referred to in the

text was often adopted. The testator did not give a fifth, a fourth, &c., to each heir, but gave so many parts, e.g. five or four parts to one heir, and so many more to another. The number of parts given to each was added up, and the total formed the number of which these parts were taken to be a fraction. For instance, if a testator gave to A five parts, to B six, and to C two, the whole number amounting to thirteen, A took five-thirteenths, B six-thirteenths, and C two-thirteenths.

So far all was simple, but a greater complication was introduced by adopting, conjointly with this calculation of parts, a mode of reckoning derived from the familiar measure of the *as*, or pound weight, and its division into twelve ounces. The *hereditas* was considered to be represented by the *as*, and the parts by the ounces. But the testator had the power of determining how many ounces there should be in this imaginary pound. In the instance above given the *as* contains thirteen *unciæ*. But supposing the testator assigned a certain number of parts to some of his heirs, and not to others, as, to A five parts, to B six parts, and then made C a co-heir, but without assigning him any number of parts, the law supposed the testator to have divided his pound into twelve ounces as the standard number, and gave the heir to whom no number of parts was assigned such a number as made up the *as*. In this instance, therefore, C would have one ounce or part. But if the whole number of parts expressly given exceeded twelve, then the testator was supposed to have been measuring out his inheritance by the double *as* (*dupondius*), and the heir to whom no express number was given took the number of parts wanting to make up twenty-four. If the parts expressly given exceeded twenty-four, then the *tripondius*, containing thirty-six ounces, was the measure, and so on. The testator never died only partly testate; for whatever he gave was taken to make up the whole inheritance. If his testament only disposed of a portion of his property in the way mentioned in the text, viz. by his only giving six ounces (*semis*) to his heir, and his instituting only one heir, six was considered to be the number of ounces he wished to have in the *as*, and therefore he died testate as to all his property. If he did not use any expression referring to the parts of an *as*, but gave his heir specific things, having other property besides, what he did give was considered to represent what he did not give; as, for instance, if a man possessed large estates, and made A his heir, giving him one farm, and named no other heir, A took all his property: for this one farm was taken to be a description of the whole.

The *as* was thus divided: *uncia*, one ounce; *sextans*, one-sixth of an *as*, or two ounces; *quadrans*, one-fourth, or three ounces; *triens*, one-third, or four ounces; *quincunx*, five ounces; *semis*, one-half, or six ounces; *septunx*, seven ounces; *bes*, contracted from *bis triens*, eight ounces; *dodrans*, contracted from *de quadrans*, the *as* minus a *quadrans*, nine ounces; *dex-*

tans, contracted from *de sextans*, ten ounces; and *deunx*, eleven ounces.

6. Si plures instituantur, ita demum partium distributio necessaria est, si nolit testator eos ex æquis partibus heredes esse: satis enim constat, nullis partibus nominatis, æquis ex partibus eos heredes esse. Partibus autem in quorundam personis expressis, si quis alius sine parte nominatus erit, si quidem aliqua pars assi deerit, ex ea parte heres fit, et si plures sine parte scripti sunt, omnes in eadem parte concurrent. Si vero totus as completus sit, in partem dimidiam vocantur et ille vel illi omnes in alteram dimidiam. Nec interest, primus an medius an novissimus sine parte scriptus sit: ea enim pars data intellegitur, quæ vacat.

6. If several heirs are appointed, it is not necessary that the testator should specify their several shares, unless he intends that they should not take in equal portions. For if no division is made, the heirs clearly take equal portions. But if the shares of some should be specified, and another be named heir without having any portion assigned him, he will take the fraction that may be wanting to make up the *as*. And if several are instituted heirs without having any portion assigned them, they will all divide this remaining fraction among them. But, if the whole *as* is given among those whose parts are specified, and there is then no fraction left, then they whose shares are not specified take one moiety, and he or they whose shares are specified the other moiety. It is immaterial whether the heir whose share is not specified holds the first, middle, or last place in the institution; it is always the part not specifically given that is considered to belong to him.

D. xxviii. 5. 9. 12; D. xxviii. 5. 17; D. xxviii. 5. 20.

From this paragraph we may add one more detail of the system pursued in calculating the parts of the inheritance. If the number of parts expressly given amounted exactly to twelve, and there was an heir instituted to whom no parts were given, the *dupondius* was taken as the standard, and this heir to whom no parts were given took twelve out of twenty-four.

7. Videamus, si pars aliqua vacet nec tamen quisquam sine parte heres institutus sit, quid juris sit? Veluti si tres ex quartis partibus heredes scripti sunt. Et constat, vacantem partem singulis tacite pro hereditaria parte accedere et perinde haberi, ac si ex tertiis partibus heredes scripti essent: et ex diverso si plus asse in portionibus sit, tacite singulis decrescere, ut, si verbi gratia quattuor ex tertiis partibus heredes scripti sint, perinde habeantur, ac si unusquisque ex quarta parte scriptus fuisset.

7. Let us inquire how we ought to decide in case a part remains unappropriated, and yet each heir has his portion assigned him: as, if three should be instituted and the inheritance divided into four parts. It is clear, in this case, that the undisposed part would be divided among them in proportion to the share given to each, and it would be exactly as if each had had a third part assigned him. And (conversely), if heirs are instituted with such portions as in the whole to exceed the *as*, then each heir must suffer a proportionate diminution; for example, if four are instituted, and the inheritance divided into three parts, this would be the same as if each of the written heirs had been given a fourth only.

D. xxviii. 5. 13. 2 *et seq.*

8. Et si plures unciæ quam duodecim distributæ sunt, is, qui sine parte institutus est, quod dipondio deest, habebit: idemque erit, si dipondius expletus sit. Quæ omnes partes ad assem postea revocantur, quamvis sint plurium unciarum.

8. If more than twelve ounces are bequeathed, then he who is instituted without any prescribed share shall have the amount wanting to complete the second *as;* and so, if all the parts of the second *as* are already bequeathed, he shall have the amount necessary to make up the third *as.* But all these parts are afterwards reduced to one single *as*, however great may be their number of ounces.

D. xxviii. 5. 18.

The concluding sentence of the section means, that though, for the sake of calculating the parts, we go beyond the *as* to the *dupondius* or *tripondius*, yet we must always consider the *as* as representing the inheritance. For example, to be quite correct, we must make 15-24ths into 7½-12ths, so that the portions of the inheritance may be expressed with reference to the twelve *unciæ* of the *as*.

9. Heres et pure et sub condicione institui potest. Ex certo tempore aut ad certum tempus non potest, veluti 'post quinquennium quam moriar' vel 'ex kalendis illis' aut 'usque ad kalendas illas heres esto': diemque adjectum pro supervacuo haberi placet et perinde esse, ac si pure heres institutus esset.

9. An heir may be instituted simply or conditionally, but not from or to any certain period; as 'after five years from my death,' or 'from the calends of such a month,' or 'until the calends of such a month'. The term thus added is considered a superfluity, and the institution is treated exactly as if unconditional.

D. xxviii. 5. 34.

The first part of this paragraph must be understood as referring to heirs other than *sui heredes.* If a *suus heres*, or at any rate if a *filius*, was instituted *sub conditione*, unless the fulfilment of the condition was within his own power, the testament was null. (D. xxviii. 5. 4. pr.)

If the institution was conditional, all those rights which otherwise would date from the death of the testator, dated from the accomplishment of the condition. When the condition was accomplished, the heir entered on the inheritance, and then by this *aditio* (not by the accomplishment of the condition) his rights were carried back to the time when the testator died. *Heres quandoque adeundo hereditatem jam tunc a morte successisse defuncto intellegitur.* (D. xxix. 2. 54.) Until the heir entered the inheritance was said *jacere*, to be in abeyance. But the rule that *aditio* has a retrospective effect is qualified by another rule already mentioned, that an inheritance in abeyance represents the person of the deceased testator, not of the future heir. (See par. 2.)

There are two rules of Roman law, which deserve attention, as illustrating how completely succession was regarded as the transfer of the whole *persona* of the deceased. It was a rule of law that a person could not die partly testate and partly intestate; if his testament was valid at all, his *heredes ab intestato* were en-

tirely excluded. It was also a rule of law, that a person who once became heir, could not cease to be heir. Thus we have seen (par. 5) that if there was a single heir, and he was instituted for six ounces, he took the whole inheritance ; for the testator could not die testate as to six ounces and intestate as to the remaining six. Again, if a person was instituted heir from a certain time, there would be no one but the *heredes ab intestato* to take in the meantime, and they must cease to be heirs when the time arrived ; if the institution was to take effect only up to a certain time, the instituted heir would cease to be heir at the expiration of the time, and the *heredes ab intestato* would then take the inheritance. Such an institution would have offended against the second rule we have just mentioned, viz. that a person who had once been heir could not cease to be heir (D. xxviii. 5. 88), whence the adage *semel heres semper heres ;* for in the first case the *heredes ab intestato*, in the second the instituted heir, would cease, at the end of a certain time, to be heir. But if the institution was conditional, the *heredes ab intestato* did not take until the condition was fulfilled, and were excluded by the possibility which existed at every moment of time that the testamentary heir would be able to enter on the inheritance by the condition being accomplished. (D. xxix. 2. 39.)

The text speaks of *certum tempus ;* if the time only was uncertain, if the event was one that must happen at some time, as that B should die, but the time of its happening was, as in this case, uncertain, and the testator said, 'Let A be my heir from the date of B's death,' this would operate to make the institution conditional. *Dies incertus conditionem in testamento facit.* (D. xxxv. 1. 75.) It would be uncertain whether A would outlive B ; but if, during A's lifetime, B died, which he might at any moment, the condition, viz. that A should outlive him, would be accomplished, and this possibility excluded the *heredes ab intestato.*

A soldier might make his testament *ex certo tempore* or *ad certum tempus* (D. xxix. 1. 41. pr.), and might die partly testate and partly intestate. (See par. 5.)

10. Impossibilis condicio in institutionibus et legatis nec non in fideicommissis et libertatibus pro non scripto habetur.

10. An impossible condition in the institution of heirs, gift of legacies, creation of *fideicommissa*, and gifts of freedom, is considered as not inserted at all.

D. xxviii. 7. 1.

That the institution was regarded as unconditional instead of void, when the condition was one not allowed by law, must be ascribed to the anxiety of Romans not to die intestate, and the consequent favour with which the law regarded any means of treating a will as valid. An obligation containing an impossible condition would be void. (Bk. iii. Tit. 19. 11.)

Possibilis est quæ per rerum naturam admitti potest : impossibilis quæ non potest. (PAUL. *Sent.* iii. 4. 2. 1.) But a thing

contrary to law, or to *boni mores*, was considered as impossible as if it was impossible *per rerum naturam*. (PAUL. *Sent.* iii. 4. 2; D. xxviii. 7. 14.)

11. Si plures condiciones institutioni adscriptæ sunt, si quidem conjunctim, ut puta 'si illud et illud factum erit,' omnibus parendum est: si separatim, veluti 'si illud aut illud factum erit,' cuilibet obtemperare satis est.

11. When several conditions are attached to the institution, if they are placed in the conjunctive, as, 'if this thing and that thing are done,' all the conditions must be complied with. But, if the conditions are placed in the alternative, as 'if this or that is done,' it will be sufficient to comply with any one.

D. xxviii. 7. 5.

12. Hi, quos numquam testator vidit, heredes institui possunt, veluti si fratris filios peregri natos ignorans, qui essent, heredes instituerit: ignorantia enim testantis inutilem institutionem non facit.

12. A testator may institute persons his heirs whom he has never seen, as, his brother's sons, born in a foreign country, and unknown to him; for the want of this knowledge will not make the institution void.

C. vi. 24. 11.

TIT. XV. DE VULGARI SUBSTITUTIONE.

Potest autem quis in testamento suo plures gradus heredum facere, ut puta 'si ille heres non erit, ille heres esto': et deinceps, in quantum velit, testator substituere potest et novissimo loco in subsidium vel servum necessarium heredem instituere.

A man by testament may appoint several degrees of heirs; as, for instance, 'if so and so will not be my heir, let so and so be my heir'. And so on through as many substitutions as he shall think proper. He may even, in the last place, and as an ultimate resource, institute a slave his necessary heir.

GAI. ii. 174; D. xxviii. 6. 36. pr.

Substitution was really a conditional institution. If A is not my heir, if, for instance, he dies before me, I appoint B. The extent to which substitution was carried, was owing to the importance attached to dying testate; and partly also, in the time of the emperors, to the wish to guard against the operation of the *lex Julia et Papia*, which created numerous causes of incapacity to take under a testament, and gave the shares of those instituted, but incapable of taking, as *caduca*, to those named in the testament who were married and had children, and, if there were no such persons, to the *ærarium*, or public treasury. As the effect of the *lex Julia et Papia* cannot be discussed without taking legacies into consideration, a detailed account of the two laws known by this name is deferred till we reach the 20th Title. By substitution, that which under these laws was a *caducum* went to the substituted heir, if qualified to take, and did not follow the course of devolution which these laws prescribed.

This kind of substitution is termed *vulgaris*, as opposed to *substitutio pupillaris*, the subject of the next Title.

1. Et plures in unius locum possunt substitui, vel unus in plurium, vel singuli singulis, vel invicem ipsi, qui heredes instituti sunt.

1. A testator may substitute several in the place of one, or one in the place of several, or one in the place of each one, or he may substitute the instituted heirs themselves reciprocally to one another.

GAI. ii. 175 ; D. xxviii. 6. 36. 1.

Three advantages which co-heirs gained by being substituted to each other are to be noticed: (1) If any one instituted heir died before the testator, or refused to take his share of the inheritance, his share was, in fact, undisposed of. But as the testator was always supposed to have disposed of his whole estate if he disposed of any part, this share was divided among all those who entered on the inheritance in proportions corresponding to the share given them by the will. Their claim to this was called the *jus accrescendi*. But a testator sometimes produced nearly the same effect as the law would have produced for him, by substituting the heirs who entered on the inheritance in the place of those who did not, thus preventing any share from becoming vacant. The effect was nearly the same, but not quite so. It was open to the substituted heirs to refuse the inheritance of this new part, which required to be expressly entered on: whereas, if instituted heirs once entered on the share given them by the testament, they could not decline accepting any further portion which devolved on them by the *jus accrescendi*. (D. xxix. 2. 35. pr.) (2) Surviving co-heirs might possibly gain by not having to share with the representatives of deceased heirs. The representatives of an instituted heir who died after entering on the inheritance received his portion of the share of a co-heir subsequently renouncing. But if the co-heirs were substituted to each other, then only those living at the time when the choice of entering on the vacant share was offered them, took by substitution (D. xxviii. 6. 23 ; D. xxviii. 5. 59. 7), the benefit of substitution, like that of institution, being personal; and the representatives of a co-heir who had died after entering, but before he had accepted the benefit of substitution, would lose what, under the *jus accrescendi*, would come to them. (D. xxviii. 6. 45. 1.) (3) The laws known under the joint name of the *lex Julia et Papia Poppœa* (A.D. 9), had, while in force, given a further reason for this mode of mutually substituting the heirs to each other, as under their provisions some persons could take what was given them, but could not claim *caduca*. By substitution, an heir incapable of claiming a *caducum* under these laws might take it as substituted heir. For the mode in which these laws operated, see note on Tit. 20. 8.

It is easy to understand, that where there were more than two persons instituted, the devolution might not be the same by substitution and by the *jus accrescendi*. Supposing A, B, and C

were all instituted heirs, and B substituted to A, and then D substituted to B; if A and B died, by B being substituted to A the shares of A and B would both go to D; but by the *jus accrescendi* (i.e. supposing B had not been substituted to A) the share of A would have been vacant, and would have been divided between D and C.

2. Et si ex disparibus partibus heredes scriptos invicem substituerit et nullam mentionem in substitutione habuerit partium, eas videtur partes in substitutione dedisse, quas in institutione expressit: et ita divus Pius rescripsit.

2. If a testator, having instituted several heirs with unequal shares, substitutes them reciprocally the one to the other, and makes no mention of the shares they are to have in the substitution, he is considered to have given the same shares in the substitution which he gave in the institution; thus the Emperor Antoninus decided by rescript.

C. vi. 26. 1.

If he chose, however, to specify the shares they were to take in that portion to which they were substituted, there was no necessity that they should be the same shares as those they were said to take by institution.

3. Sed si instituto heredi et coheredi suo substituto dato alius substitutus fuerit, divi Severus et Antoninus sine distinctione rescripserunt, ad utramque partem substitutum admitti.

3. If a co-heir is substituted to any instituted heir, and a third person to that co-heir, the Emperors Severus and Antoninus have by rescript decided that this third person shall be admitted to the portions of both without distinction.

D. xxviii. 6. 41. pr.

A testator institutes two heirs, A and B. He substitutes B to A, and to B he substitutes C. Supposing neither A nor B takes the inheritance, C will take the part of each, *utramque partem*, and will take it without any distinction (*sine distinctione*) as to what was the order in which the testament was drawn up, or whether it is A or B that first dies or refuses or becomes incapable of taking the inheritance. How he would take the part of B is clear enough; but if B died or refused the inheritance before A, how would C take A's share? He did so by the rule *substitutus substituto censetur substitutus instituto;* the person substituted to the substitute is considered substituted to the instituted heir; C is substituted to B, who is substituted to A, and therefore C is, by what was termed a *tacita substitutio,* substituted to A, and takes his part.

4. Si servum alienum quis patremfamilias arbitratus, heredem scripserit et, si heres non esset, Mævium ei substituerit isque servus jussu domini adierit hereditatem, Mævius in partem admittitur. Illa enim verba 'si heres non erit' in

4. If a testator institutes the slave of another his heir, under the misapprehension that this slave is a *paterfamilias*, and, to provide for the case of this person not becoming his heir, substitutes Mævius in his place: then, if that slave should afterwards enter

eo quidem quem alieno juri subjectum esse testator scit, sic accipiuntur: si neque ipse heres erit neque alium heredem effecerit: in eo vero, quem patremfamilias esse arbitratur, illud significant: si hereditatem sibi eive, cujus juri postea subjectus esse cœperit, non adquisierit. Idque Tiberius Cæsar in persona Parthenii servi sui constituit.

upon the inheritance at the command of his master, the substituted person, Mævius, would be admitted to a part. For the words, 'if he does not become my heir,' in the case of a person whom the testator knew to be under the dominion of another, are taken to mean, if he neither becomes heir himself, nor causes another to be heir; but in the case of a person whom the testator supposed to be a *paterfamilias*, the words mean, 'if the heir acquires the inheritance neither for himself nor for him to whose dominion he afterwards becomes subject'. This was decided by Tiberius Cæsar in the case of his own slave Parthenius.

D. xxviii. 5. 40, 41.

The *pars* which each took was one-half. (THEOPH. *Par.*) That each should take half in such a case was a mere arbitrary regulation, formed on no principle of law, but only meeting, as was supposed, the equity of the case. It seemed hard that the master of the slave should lose all benefit from the institution, when the words of the testament gave him the whole inheritance, and hard that the instituted heir should take nothing, when the master of the slave was profiting by a mistake of the testator. Accordingly Tiberius decided that each should have half.

TIT. XVI. DE PUPILLARI SUBSTITUTIONE.

Liberis suis impuberibus, quos in potestate quis habet, non solum ita, ut supra diximus, substituere potest, id est ut, si heredes ei non extiterint, alius ei sit heres, sed eo amplius ut et, si heredes ei extiterint et adhuc impuberes mortui fuerint, sit eis aliquis heres. Veluti si quis dicat hoc modo: 'Titius filius meus heres mihi esto: si filius meus heres mihi non erit, sive heres erit et prius moriatur, quam in suam tutelam venerit (id est pubes factus sit), tunc Seius heres esto'. Quo casu si quidem non extiterit heres filius, tunc substitutus patri fit heres: si vero extiterit heres filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. Nam moribus institutum est, ut, cum ejus ætatis sunt, in qua ipsi sibi testamentum facere non possunt, parentes eis faciant.

A testator can substitute an heir in place of his children, under the age of puberty, and in his power, not only in the manner we have just mentioned, namely, by appointing some other person his heir in case his children do not become his heirs, but also, if they do become his heirs, but die under the age of puberty, he may substitute another heir; as, for example, if any one says, 'Let Titius, my son, be my heir, and, if he should not become my heir, or, becoming my heir, should die before he comes to be his own master, i.e. before he arrives at puberty, let Seius be my heir'. In this case, if the son does not become the heir, the substituted heir is heir to the father; but, if the son becomes heir, and then dies under the age of puberty, the substituted heir is then heir to the son. For custom has established that ascendants may make testaments for their children who are not of an age to make testaments for themselves.

GAI. ii. 179, 180.

A child under the age of puberty might be *sui juris*, and so have the legal right to make a testament; his *status* might be such as to give him the *testamenti factio*, but he would not have the power of exercising his right to make a testament, according to the distinction between a right and the power of availing oneself of the right, so often met with in Roman law. If this child, then, died before attaining fourteen years, he would necessarily die intestate, which in Roman eyes was so great a misfortune for any one, that the father of the child was permitted to make the child's testament, but only as a part of, and as accessory to, his own. The right to make a child's testament depended on the possession of the *patria potestas*, and could only be exercised with regard to those children who were in the father's power.

In the words *si filius meus heres mihi non erit, sive heres erit et prius moriatur*, we have an instance both of the vulgar and the pupillary substitution. It was long a vexed question among the jurisprudents (Cic. *de Orat.* i. 39. 57), whether, if one only was expressed, the other was implied; whether, for instance, if the words *si filius meus heres mihi non erit* stood alone, and the child became heir but died under the age of puberty, the substituted heir would take as if he had been substituted by vulgar substitution. Marcus Aurelius terminated the doubt by deciding that each substitution implied the other (D. xxviii. 6. 4), so that, when the son was instituted heir, the person substituted to him by pupillary substitution was considered as substituted to him by vulgar substitution; and conversely, the person substituted by vulgar substitution was considered as substituted by pupillary substitution, unless, in either case, the testator had expressed a wish to the contrary.

1. Qua ratione excitati, etiam constitutionem in nostro posuimus codice, qua prospectum est, ut, si mente captos habeant filios vel nepotes vel pronepotes cujuscumque sexus vel gradus, liceat eis, etsi puberes sint, ad exemplum pupillaris substitutionis certas personas substituere: sin autem resipuerint, eandem substitutionem infirmari, et hoc ad exemplum pupillaris substitutionis, quæ, postquam pupillus adoleverit, infirmatur.

1. Guided by this principle, we have also inserted a constitution in our code, which provides that, if a man has children, grandchildren, or great-grandchildren, out of their right minds, of whatever sex or degree, he may, although they have attained the age of puberty, substitute certain persons as heirs in place of such children, on the analogy of pupillary substitution. But if they regain their reason, the substitution becomes void, on the analogy of pupillary substitution, which ceases to operate when the minor attains to puberty.

C. vi. 26. 9; D. xxviii. 6. 14.

This kind of substitution is termed by the commentators *quasi-pupillaris* or *exemplaris*, because made *ad exemplum pupillaris substitutionis*. The power here given differs from that of making a child's testament in two points: (1) it could be made by any ascendant, whether paternal or maternal, and not only by the *paterfamilias*; and (2) the testator could not substitute any one

he pleased. He was obliged to appoint one among *certas personas*, viz. one of the descendants of the insane, and, if there was none, then one of his brothers. If he had no brother, the choice of the testator was then unrestrained. (C. vi. 26. 9.)

If for any other cause than insanity a descendant was incapable of making a testament, the emperor would, if he thought fit, give a licence to the head of the family to make a testament for him. (D. xxviii. 6. 43. pr.)

2. Igitur in pupillari substitutione secundum præfatum modum ordinata duo quodammodo sunt testamenta, alterum patris, alterum filii, tamquam si ipse filius sibi heredem instituisset: aut certe unum est testamentum duarum causarum, id est duarum hereditatum.

2. Therefore in a pupillary substitution, made in the way we have mentioned, there are in a manner two testaments, one of the father, the other of the son, as if the son had instituted an heir to himself; or at least there is one testament, dealing with two matters, that is, two inheritances.

GAI. ii. 180.

3. Sin autem quis ita formidolosus sit, ut timeret, ne filius ejus pupillus adhuc ex eo, quod palam substitutum accepit, post obitum ejus periculo insidiarum subiceretur: vulgarem quidem substitutionem palam facere et in primis testamenti partibus debet, illam autem substitutionem, per quam et si heres extiterit pupillus et intra pubertatem decesserit, substitutus vocatur, separatim in inferioribus partibus scribere eamque partem proprio lino propriaque cera consignare et in priore parte testamenti cavere ne inferiores tabulæ vivo filio et adhuc impubere aperiantur. Illud palam est, non ideo minus valere substitutionem impuberis filii, quod in iisdem tabulis scripta sit, quibus sibi quisque heredem instituisset, quamvis hoc pupillo periculosum sit.

3. If a testator is so apprehensive as to fear lest, after his death, his son, being yet a pupil, should be exposed to the risk of having designs formed against him from another person being openly substituted to him, he ought to make openly a vulgar substitution and insert it in the first part of his testament; and to write the substitution, by which a substituted heir is called to the inheritance, if his son should become an heir and then die under the age of puberty, by itself, and in the lower part, which part ought to be separately tied up and sealed: and he ought also to insert a clause in the first part of his testament, forbidding the lower part to be opened while his son is alive and under the age of puberty. Of course a substitution to a son under the age of puberty is not less valid because written on the same tablet in which the testator has instituted him his heir, whatever danger it may involve to the pupil.

GAI. ii. 181.

4. Non solum autem heredibus institutis impuberibus liberis ita substituere parentes possunt, ut et si heredes eis extiterint et ante pubertatem mortui fuerint, sit eis heres is, quem ipsi voluerint, sed etiam exheredatis. Itaque eo casu si quid pupillo ex hereditatibus legatisve aut donationibus propinquorum atque amicorum adquisitum fuerit, id omne ad substitutum pertinet. Quæcumque diximus de substitutione impuberum liberorum vel heredum institutorum vel exhere-

4. Ascendants may not only substitute to their children under the age of puberty, so that if such children become their heirs, and die under the age of puberty, any one whom the testator pleases shall be made their heir, but they may also substitute to their disinherited children; and therefore, in such a case, whatever a disinherited child, within the age of puberty, may have acquired by succession, by legacies, or by gift from relations and friends, all becomes the property of the substituted heir. All

datorum, eadem etiam de postumis intellegimus.

we have said concerning the substitution of children under the age of puberty, whether instituted heirs, or disinherited, is applicable also to posthumous children.

Gai. ii. 182, 183.

It was not because he instituted a child in his own testament that a *paterfamilias* could make the testament of that child, but because the child was in his power, and hence he could make the testaments even of children whom he disinherited. Grandchildren and other descendants could also be made subject to a pupillary substitution by their grandfather, if they were immediately in his power, that is, if their own father was dead or emancipated.

It was necessary that the child should be under the power of the father at the time of making the substitution, and also at that of the father's death. No testator could, therefore, substitute to an emancipated child. (D. xxviii. 6. 2. pr.) If, after the child became *sui juris*, he was arrogated, this vitiated the substitution ; but the person who arrogated him was obliged to give security that if the child died under the age of puberty, he would give up to the substituted heir, or to the *heredes legitimi* if no one was substituted, all that would have come to the pupil if the substitution had remained valid. Pupillary substitution might also be made by the adoptive father; but it did not affect the property which the pupil had when arrogated. (See Bk. i. Tit. 11. 3.) It is, perhaps, hardly necessary to observe, that in every case of pupillary substitution save the last, the substituted heir took not only what the pupil received from the father, but all that the pupil would have had to dispose of by testament, if he had been capable of making a testament.

5. Liberis autem suis testamentum facere nemo potest, nisi et sibi faciat: nam pupillare testamentum pars et sequela est paterni testamenti, adeo ut, si patris testamentum non valeat, ne filii quidem valebit.

5. No one can make a testament for his children unless he also makes a testament for himself: for the pupillary testament is a part of, and accessory to, the testament of the parent, so much so, that if the testament of the father is not valid, neither is that of the son.

D. xxviii. 6. 2. 1.

The two testaments were generally contained in the same instrument; but a testator might, if he pleased, make his son's testament by a different instrument, or might even make it by verbal nuncupation, although his own testament was written.

6. Vel singulis autem liberis vel qui eorum novissimus impubes morietur, substitui potest. Singulis quidem, si neminem eorum intestato decedere voluit: novissimo, si jus legitimarum hereditatum integrum inter eos custodiri velit.

6. A testator may make a pupillary substitution to each of his children, or to him who shall die the last under the age of puberty; to each, if he is unwilling that any of them should die intestate; to the last who shall die, if he wishes that the order of legal succession should be rigidly preserved among them.

D. xxviii. 6. 37.

7. Substituitur autem impuberi aut nominatim, veluti 'Titius' aut generaliter 'quisquis mihi heres erit': quibus verbis vocantur ex substitutione, impubere filio mortuo, qui et scripti sunt heredes et exstiterunt, et pro qua parte heredes facti sunt.

7. A substitution may be made to a child under the age of puberty by name, as 'Let Titius succeed'; or generally, as 'whoever shall be my heir'. By these latter words all are called to the inheritance by substitution, on the death of the son under the age of puberty, who have been instituted, and have become heirs to the father, and each in proportion to the share assigned to him as heir.

D. xxviii. 6. 8. 1.

Quisquis mihi heres erit, idem impuberi filio heres esto, is the full expression given in the Digest.

8. Masculo igitur usque ad quattuordecim annos substitui potest, feminæ usque ad duodecim annos: et si hoc tempus excesserit, substitutio evanescit.

8. A substitution then may be made to males up to the age of fourteen, and to females up to that of twelve years: this age once passed, the substitution is at an end.

D. xxviii. 6. 14.

The father could not extend the time beyond fourteen years, but he could make it less; as, for example, *si filius meus intra decimum annum decesserit*.

The *substitutio pupillaris* would be at an end not only by the pupil attaining the age of puberty, but by his undergoing a *capitis deminutio* and not recovering his former *status* before the age of puberty, or dying before his father, as, in either of these cases, it would be impossible he should make a testament. Or, again, if no one entered on the father's inheritance, or the father's testament was in any way made inoperative, the testament of the son was void, because it was on the validity of the testament of the father that the validity of the testament of the son depended.

9. Extraneo vero vel filio puberi heredi instituto ita substituere nemo potest, ut, si heres extiterit et intra aliquod tempus decesserit, alius ei sit heres: sed hoc solum permissum est, ut eum per fideicommissum testator obliget, alii hereditatem ejus vel totam vel pro parte restituere: quod jus quale sit, suo loco trademus.

9. After having instituted a stranger or son of full age, a testator cannot then go on to substitute another heir to him, if he dies within a certain time. All that is allowed is, to oblige, by a *fideicommissum*, the person instituted to give up all or a part to a third person. What the law is on this point we will explain in its proper place.

Gai. ii. 184.

It is to be observed that, in a *fideicommissum*, the testator does not attempt to deal with the inheritance of another; he only regulates the transmission of his own, and nothing, therefore, passed by the *fideicommissum*, except what came to the person instituted from the testator.

Soldiers could make a testament for their children without having made their own, and could substitute, so far as the inheritance they gave went, to their children over puberty, to emancipated children and strangers. (D. xxviii. 6. 2. 1; D. xxviii. 6. 10. 5; D. xxviii. 6. 15; D. xxix. 1. 41. 4 and 5.)

TIT. XVII. QUIBUS MODIS TESTAMENTA INFIRMANTUR.

Testamentum jure factum usque eo valet, donec rumpatur irritumve fiat.

A testament duly made remains valid until it is either revoked or rendered ineffectual.

If something was originally wanting to the validity of the testament, if some formality was wanting, it was spoken of as being *injustum, non jure factum*, or *imperfectum;* and as *nullius momenti*, if a child was not properly disinherited. But it might be quite valid when made, and subsequently lose its effect; in such a case it was either *ruptum*, i.e. its force was broken, it was revoked, either by agnation of a *suus heres*, or by a subsequent testament; or it was *irritum*, rendered useless by the testator undergoing a change of *status*, or by no one entering, under it, on the inheritance. (D. xxviii. 3. 1.) In this last case it was specially said to be *destitutum;* but the general expression *irritum* was applied, as well as the more particular term *destitutum*, to a testament that had been abandoned.

We have no term nearer to *ruptum* than revoked; but it does not express it very accurately, as the rupture of the testament might be something quite independent of the testator's will, whereas revocation properly implies a voluntary act of the testator. We have hitherto, in order to keep up the metaphor, translated it, 'the force of the testament is broken'; but this paraphrase is too cumbrous to be retained when the expression occurs frequently.

1. Rumpitur autem testamentum, cum in eodem statu manente testatore ipsius testamenti jus vitiatur. Si quis enim post factum testamentum adoptaverit sibi filium per imperatorem eum, qui sui juris est, aut per prætorem secundum nostram constitutionem eum, qui in potestate parentis fuerit, testamentum ejus rumpitur quasi adgnatione sui heredis.

1. A testament is revoked when, the testator still remaining in the same *status*, the effect of the testament is destroyed; for if, after making his testament, he arrogates a person *sui juris* by licence from the emperor, or if in the presence of the prætor, and by virtue of our constitution, he adopts a child under the power of his natural ascendant, then the testament is revoked by this quasi-agnation of a *suus heres.*

GAI. ii. 138 *et seq.*

We have already seen how the rupture of the testament might be avoided by instituting or disinheriting posthumous children and *quasi-postumi*. (Tit. 13. 2.) But when a new *suus heres* came into the family by the civil agnation produced by adoption or arrogation, the stricter law of the time of Gaius pronounced that the testament was inevitably revoked. But in the times of the later jurists, if the new *suus heres* had been instituted by anticipation, the testament was considered as not revoked (D. xxviii. 2. 23),

and it was only when he had been omitted or disinherited, that the rule making the testament of no effect was allowed to prevail. And Justinian seems here to countenance the opinion by omitting the word *omnimodo*, which Gaius adds to *rumpitur*.

2. Posteriore quoque testamento, quod jure perfectum est, superius rumpitur. Nec interest, an extiterit aliquis heres ex eo, an non extiterit: hoc enim solum spectatur, an aliquo casu existere potuerit. Ideoque si quis aut noluerit heres esse, aut vivo testatore aut post mortem ejus, antequam hereditatem adiret, decesserit, aut condicione, sub qua heres institutus est, defectus sit, in his casibus paterfamilias intestatus moritur: nam et prius testamentum non valet, ruptum a posteriore, et posterius æque nullas vires habet, cum ex eo nemo heres extiterit.

2. A former testament is equally revoked by a subsequent one made as the law requires, nor does it signify whether under the new testament any one becomes heir or not; the only question is, whether there could have been an heir under it: therefore, if an instituted heir renounces, or dies, either during the life of the testator, or after the testator's death, but before entering upon the inheritance, or if his interest terminates by the failure of the condition under which he was instituted—in any of these cases the testator dies intestate; for the first testament is invalid, being revoked by the second, and the second is of as little force, as there is no heir under it.

GAI. ii. 144.

If the heir instituted in a second testament would have taken as *heres ab intestato*, the second testament, although it might be not formally made (*jure perfectum*), was still held valid, as an expression of the last will of the deceased, who died intestate indeed, but whose wishes were binding on the heir. (D. xxviii. 3. 2; C. vi. 23. 21. 3.)

The two modes mentioned in the text by which a testament could be revoked are the agnation of a *suus heres* and the making a subsequent testament. But the testator could also revoke it by tearing or defacing it, or by signifying a wish to have it revoked before three witnesses; or if the testament had at the time of the testator's death been made ten years, it was enough to make it considered as revoked if the testator had signified, before three witnesses or by a deed, his wish that it should not remain in force. Theodosius had enacted that a testament should be always invalid after ten years had expired from the time of its being made. Justinian allowed testaments to remain valid, as a general rule, for any length of time, but retained the effect of the lapse of time if the testator had also signified, as above mentioned, his wish to have his testament revoked. (C. vi. 23. 27.)

When it is said that a subsequent testament to revoke a prior one must be regularly made, it must be understood that, in the case of soldiers, their privilege of making a testament in any way they pleased would permit them to revoke a prior testament by any testament that expressed their intentions.

3. Sed si quis, priore testamento jure perfecto, posterius æque jure fecerit, etiamsi ex certis rebus in eo

3. If any one, after having duly made a testament, makes another in an equally valid way, although the heir is

heredem instituerit, superius testamentum sublatum esse divi Severus et Antoninus rescripserunt. Cujus constitutionis inseri verba jussimus, cum aliud quoque præterea in ea constitutione expressum est. 'Imperatores Severus et Antoninus Cocceio Campano. Testamentum secundo loco factum, licet in eo certarum rerum heres scriptus sit, jure valere, perinde ac si rerum mentio facta non esset, sed teneri heredem scriptum, ut, contentus rebus sibi datis, aut suppleta quarta ex lege Falcidia, hereditatem restituat his, qui in priore testamento scripti fuerant, propter inserta verba secundo testamento, quibus, ut valeret prius testamentum, expressum est, dubitari non oportet.' Et ruptum quidem testamentum hoc modo efficitur.

instituted therein for certain particular things only, yet, as the Emperors Severus and Antoninus have decided by a rescript, the first testament is considered to be thereby destroyed. We have ordered the words of this constitution to be here inserted, as it contains a further provision. 'The Emperors Severus and Antoninus to Cocceius Campanus: a second testament, although the heir named in it is instituted in particular things only, shall be as valid as if the things had not been specified, but unquestionably the heir instituted in the second testament must content himself either with the things given him, or with the fourth part, made up to him according to the *lex Falcidia*, and shall be bound to restore the rest of the inheritance to the heirs instituted in the first testament, on account of the words inserted in the second, by which it is declared, that effect shall be given to the first testament'. This, therefore, is a mode in which a testament is revoked.

D. xxxvi. 1. 29.

It was not the *lex Falcidia*, but the *senatusconsultum Pegasianum*, by which this fourth was in such a case given to the heir. (See Tit. 23. 5.)

If the heir was instituted for a part only, *certæ res*, he would by law be instituted for the whole, as no one could die partly testate; but if in the second testament it was expressed that the first should be valid, this would be the same as imposing a *fideicommissum* on the heir under the second testament, the terms of the *fideicommissum* being contained in the first testament.

4. Alio quoque modo testamenta jure facta infirmantur, veluti cum is, qui fecerit testamentum, capite deminutus sit. Quod quibus modis accidit, primo libro rettulimus.

4. Testaments duly made are also invalidated in another way, viz. if the testator suffers a *capitis deminutio*. We have shown in the First Book under what circumstances this may happen.

GAI. ii. 145.

As it was from his civil *status* that a testator's power of making a testament proceeded, any change in this was held, except in the case of soldiers (Tit. 11. 5), to invalidate any exercise of the power made before the change.

5. Hoc autem casu irrita fieri testamenta dicuntur, cum alioquin et quæ rumpantur, irrita fiunt, et quæ statim ab initio non jure fiunt, irrita sunt; et ea, quæ jure facta sunt, postea propter capitis deminutionem irrita fiunt, possumus nihilo

5. In such a case testaments are said to become ineffectual, although those which are revoked, or which, from the beginning, were not legally valid, may equally well be termed ineffectual. We may also term those testaments revoked, which, being at

minus rupta dicere. Sed quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quædam non jure facta dicuntur, quædam jure facta rumpi vel irrita fieri.

first legally made, are afterwards rendered ineffectual by a *capitis deminutio*. But, as it is more convenient to distinguish by different terms each cause that invalidates a testament, some are said to be irregularly made, and others regularly made, to be revoked or rendered ineffectual.

GAI. ii. 146.

Under *irrita testamenta* we must include those which the jurisconsults termed *destituta,* i.e. abandoned, by no one entering on the inheritance.

6. Non tamen per omnia inutilia sunt ea testamenta, quæ ab initio jure facta propter capitis deminutionem irrita facta sunt. Nam si septem testium signis signata sunt, potest scriptus heres secundum tabulas testamenti bonorum possessionem agnoscere, si modo defunctus et civis Romanus et suæ potestatis mortis tempore fuerit: nam si ideo irritum factum sit testamentum, quod civitatem vel etiam libertatem testator amisit, aut quia in adoptionem se dedit et mortis tempore in adoptivi patris potestate sit, non potest scriptus heres secundum tabulas bonorum possessionem petere.

6. But testaments at first validly made, and afterwards rendered ineffectual by a *capitis deminutio*, are not absolutely void: for if they have been attested by the seals of seven witnesses, the instituted heir can obtain possession of the goods according to the testament, provided that the testator was a Roman citizen, and was *sui juris* at the time of his death. For if a testament becomes ineffectual because the testator has lost the rights of a citizen or his liberty, or because he has given himself in adoption, and at the time of his death was under the power of his adoptive father, then the instituted heir cannot demand possession of the goods according to the terms of the testament.

GAI. ii. 147.

The meaning of the prætor giving the *bonorum possessio secundum tabulas* is, that he ordered that possession of the property should be given as the testator intended, though, by the rules of strict law, the testament in which he had expressed his intention was invalidated. The instance referred to in the text is that of a testator, after making his testament, suffering a *capitis deminutio,* but returning to his old *status* before dying. In such a case the prætor gave the *bonorum possessio ;* but if the testator had been arrogated and then emancipated, he must (since the arrogation was his own act) have after his emancipation expressly declared his wish to abide by his testament made before arrogation (GAI. ii. 147), or the prætor would not give the *bonorum possessio* to the instituted heir. This, however, cannot have been necessary after Justinian enacted that a person arrogated retained the *dominium* of his property.

7. Ex eo autem solo non potest infirmari testamentum, quod postea testator id noluit valere: plusque adeo, etsi quis post factum prius testamentum posterius facere cœperit et aut mortalitate præventus, aut quia eum ejus rei pœnituit, id

7. A testament cannot be invalidated solely because the testator is afterwards unwilling that it should take effect; so much so that, if any one, after making one testament, begins another, and then, being prevented by death, or from having

non perfecisset, divi Pertinacis oratione cautum est, ne alias tabulæ priores jure factæ irritæ fiant, nisi sequentes jure ordinatæ et perfectæ fuerint. Nam imperfectum testamentum sine dubio nullum est.

changed his mind, does not complete it, it is decided in an address to the senate by the Emperor Pertinax, that the first testament shall not be made ineffectual unless the subsequent one is regularly made and complete, for an imperfect testament is undoubtedly null.

C. vi. 23. 21. 5.

See note on paragraph 2.

8. Eadem oratione expressit, non admissurum se hereditatem ejus qui litis causa principem heredem reliquerit, neque tabulas non legitime factas, in quibus ipse ob eam causam heres institutus erat, probaturum neque ex nuda voce heredis nomen admissurum neque ex ulla scriptura, cui juris auctoritas desit, aliquid adepturum. Secundum hæc divi quoque Severus et Antoninus sæpissime rescripserunt: 'licet enim,' inquiunt, 'legibus soluti sumus, attamen legibus vivimus'.

8. The emperor declared in the same address to the senate, that he would not accept the inheritance of any testator, who, on account of a suit, made the emperor his heir; that he would never make valid a testament legally deficient in form, if, in order to cover the deficiency, he himself was instituted heir; that he would not accept the title of heir, if he was instituted by mere word of mouth; and that he would never take anything by virtue of any writing wanting the authority of strict law. The Emperors Severus and Antoninus have also often issued rescripts to the same purpose: 'for although,' say they, 'we are freed from the tie of the laws, yet we live in obedience to them'.

D. xxxii. 23.

Testators occasionally made the emperor their heir, in order that their adversary in a lawsuit might have him to contend with.

An *oratio* was an address to the senate by the emperor, in which he explained to them what they were to enact; they then put his recommendations into the shape of a *senatusconsultum*.

Tit. XVIII. DE INOFFICIOSO TESTAMENTO.

Quia plerumque parentes sine causa liberos suos vel exheredant vel omittunt, inductum est, ut de inofficioso testamento agere possint liberi, qui queruntur, aut inique se exheredatos aut inique præteritos, hoc colore, quasi non sanæ mentis fuerunt, cum testamentum ordinarent. Sed hoc dicitur, non quasi vere furiosus sit, sed recte quidem fecit testamentum, non autem ex officio pietatis; nam si vere furiosus est, nullum est testamentum.

Since ascendants often disinherit their children or omit them in their testaments without any cause, children who complain that they have been unjustly disinherited or omitted, have been permitted to bring the action *de inofficioso testamento*, on the supposition that their parents were not of sane mind when they made their testament. This does not mean that the testator was really insane, but that the testament, though regularly made, is inconsistent with the duty of affection he owed. For, if a testator is really insane at the time, his testament is null.

D. v. 2. 2, 3, 5.

As we may gather from the text, a testament was termed *inofficiosum*, which was at variance with the dictates of natural affection, and those duties of near relationship which were expressed by the term *officium pietatis*. A presumption seemed to arise that the persons very closely connected with the testator, if passed over, must have done something to merit the testator's disapprobation. They might therefore naturally desire to have their character (*æstimatio*) protected against this imputation, and they therefore applied to the prætor to set the testament aside. A testament regularly and validly made, but liable to the objection that it was *inofficiosum*, was liable to be set aside on the application of the children, or, if there were no children, on that of the ascendants, or, if there were no ascendants, on that of the brother or sister of the deceased, the claim of these last, however, only prevailing where the person instituted was *turpis*.

It is not known at what date the action *de inofficioso testamento* was first introduced. It is referred to by Cicero. (*In Verr.* i. 42.) It was brought before the *centumviri*, as were all actions concerning inheritances, and if they pronounced the testament '*inofficiosum*,' all its dispositions were set aside, and the inheritance passed according to the succession *ab intestato*. (See Introd. sec. 77, 92.)

The power of bringing the action was, however, not confined entirely to those who were disinherited. Children omitted by the mother, and grandchildren omitted by the maternal grandfather, might bring it, as we have already seen. (Tit. 13. 7.)

The object of permitting the action was that those permitted to bring it on account of their strong claims on the testator should not be disinherited or omitted altogether without sufficient cause. If, therefore, they got in any way a fourth of what they would have received in a succession *ab intestato*, or were excluded for what the law considered a just cause (which Justinian afterwards required to be expressed in the testament, Nov. 115. 3), such as gross misconduct towards the testator, they could not bring this action.

1. Non tantum autem liberis permissum est parentum testamentum inofficiosum accusare, verum etiam parentibus liberorum. Soror autem et frater turpibus personis scriptis heredibus ex sacris constitutionibus prælati sunt: non ergo contra omnes heredes agere possunt. Ultra fratres et sorores cognati nullo modo aut agere possunt aut agentes vincere.

1. It is not children only who are allowed to attack the testaments of their ascendants as inofficious. Ascendants are also permitted to attack those of their children. The brothers and sisters of a testator, also, by the imperial constitutions, are preferred to infamous persons, if any such have been instituted heirs. Thus, then, they cannot bring such an action against any heir. Beyond brothers and sisters no cognate can bring or succeed in such an action at all.

C. iii. 28. 21, 27.

Before Justinian, brothers and sisters could only bring this action while the tie of agnation was in existence. He permitted them to bring it *durante vel non agnatione* (C. iii. 28. 27), and

thus made it sufficient that they should be merely *consanguinei*, i.e. born of the same father. Subsequently, by the 118th Novel, uterine brothers or sisters were placed on the same footing as *consanguinei*.

2. Tam autem naturales liberi, quam secundum nostræ constitutionis divisionem adoptati ita demum de inofficioso testamento agere possunt, si nullo alio jure ad bona defuncti venire possunt. Nam qui alio jure veniunt ad totam hereditatem vel partem ejus, de inofficioso agere non possunt. Postumi quoque, qui nullo alio jure venire possunt, de inofficioso agere possunt.

2. But natural children, as well as adopted (the distinction between adopted children laid down in our constitution being always observed), can only attack the testament as inofficious, if they can obtain the effects of the deceased in no other way; for those who can obtain the whole or a part of the inheritance by any other means, cannot bring an action *de inofficioso*. Posthumous children, also, who are unable to recover their inheritance by any other method, are allowed to bring this action.

D. v. 2. 6. pr. and 8. 15.

Those adopted by strangers could not impugn the testament of the adoptive father, if they were disinherited or passed over, but those who were adopted by their ascendants could. This is the *divisio* here alluded to. (See Bk. i. Tit. 11. 2.)

The *actio de inofficioso testamento* was only a last resource open to those who had no other; a pupil, therefore, arrogated, and afterwards disinherited by the arrogator, could not bring this action, because he was entitled to the *quarta Antonina* (see Bk. i. Tit. 11. 3); nor, again, could an emancipated son, omitted in the testament of his father, because the prætor gave him possession of the goods *contra tabulas*. (See Tit. 13. 3.)

3. Sed hæc ita accipienda sunt, si nihil eis penitus a testatoribus testamento relictum est. Quod nostra constitutio ad verecundiam naturæ introduxit. Sin vero quantacumque pars hereditatis vel res eis fuerit relicta, de inofficioso querela quiescente, id, quod eis deest, usque ad quartam legitimæ partis repletur, licet non fuerit adjectum, boni viri arbitratu debere eam repleri.

3. All this must be understood to take place only when nothing at all has been left them by the testament of the deceased: a provision introduced by our constitution, out of respect for the rights of nature. For, if the least part of the inheritance or any one single thing has been given them, they cannot bring an action *de inofficioso testamento:* but they must have made up to them one-fourth of what would have been their share, if the deceased had died intestate, supposing what is given does not amount to this fourth: and this, although the testator has not added to his gift any direction that this fourth is to be made up to them according to the estimate of a trustworthy person.

C. iii. 28. 30. pr. and 1.

A *plebiscitum* was passed in the year B.C. 40, called the *lex Falcidia* (Tit. 22), which provided that one clear fourth of the

inheritance must remain to the heir, and the legacies could only affect three-fourths. Either from the analogy of this law, or by some express enactment, it was decided that every one who was near enough in blood to the testator to bring the action *de inofficioso*, might bring it, though mentioned in the testament, unless one-fourth was thereby given him of what he would have received in a succession *ab intestato*. This fourth part was spoken of under different names. Sometimes it was itself termed the *Falcidia* (*solam eis Falcidiam debitæ successionis relinquant*, Cod. Theod. xvi. 7. 28). Sometimes it is spoken of as the *portio legibus debita*, or *portia legitima* (C. iii. 28. 28. 1), and commentators have called it simply the *legitima*. In the text, it will be seen, the term *legitima pars* is used to express the share the persons would have taken *ab intestato*.

Before the time of Justinian (Cod. Theod. ii. 19. 4), unless a testator either expressly gave this fourth, or gave a direction that such an additional share of the goods should be added to that actually given, as some trustworthy person, who should make an estimate of the value of all the goods of the deceased, should consider would be necessary to make what was given equal to the fourth, the testament could be attacked and set aside as inofficious; but Justinian altered the law on this point, and enacted that if the testator gave anything at all, the action *de inofficioso* could not be brought, but only an action to obtain what was wanting to make up the fourth, while the testament itself remained valid. (C. iii. 28. 30. pr.) There were considerable differences between this action to make up what was wanting to the fourth part (*actio in supplementum legitimæ*) and that *de inofficioso*: the former was a personal action, there was no limit to the time in which it was to be brought, it was transmissible to the heirs of the person who could bring it, and it left the testament valid; the latter was a real action, was obliged to be brought within a certain time (see note to paragr. 7), could not be transmitted to the heirs, unless the person entitled to bring it had manifested an intention to do so, and if it was successfully brought, the testament was set aside.

4. Si tutor nomine pupilli, cujus tutelam gerebat, ex testamento patris sui legatum acceperit, cum nihil erat ipsi tutori relictum a patre suo, nihilo minus possit nomine suo de inofficioso patris testamento agere.

4. If a tutor accepts in the name of the pupil under his charge a legacy given in the testament of the tutor's own father, while nothing has been left to the tutor himself by his father's testament, he may nevertheless in his own name attack the testament of his father as inofficious.

D. v. 2. 10. 1.

To accept a legacy was to acquiesce in the validity of the testament; but it was reasonable that a tutor, who had an unavoidable duty to perform towards his pupil, should not be personally bound by an act done in his capacity as tutor.

5. Sed et si e contrario pupilli nomine, cui nihil relictum fuerit, de inofficioso egerit et superatus est, ipse quod sibi in eodem testamento legatum relictum est, non amittit.

5. Conversely, if a tutor, in the name of his pupil, to whom nothing has been left, attacks as inofficious the testament of the pupil's father, and attacks it unsuccessfully, he does not lose any legacy that may have been left to himself in the same testament.

D. v. 2. 30. 1.

Any one who unsuccessfully attacked *usque ad sententiam* a testament as inofficious, forfeited to the *fiscus* whatever was given him by the testament; but not if he desisted from the action. (D. v. 2. 8. 14.)

6. Igitur quartam quis debet habere, ut de inofficioso testamento agere non possit: sive jure hereditario sive jure legati vel fideicommissi, vel si mortis causa ei quarta donata fuerit, vel inter vivos in his tantummodo casibus, quorum nostra constitutio mentionem facit, vel aliis modis, qui constitutionibus continentur.

7. Quod autem de quarta diximus, ita intellegendum est, ut, sive unus fuerit sive plures, quibus agere de inofficioso testamento permittitur, una quarta eis dari possit, ut pro rata distribuatur eis, id est pro virili portione, quarta.

6. That a person should be debarred from bringing the action *de inofficioso testamento*, it is necessary that he should have a fourth, either by hereditary right, or by a legacy or a *fideicommissum*, or by a *donatio mortis causa*, or a *donatio inter vivos* in the cases mentioned in our constitution, or by any of the other means set forth in the constitutions.

7. What we have said of the fourth must be understood as meaning that, whether there is one person only or several, who can bring an action *de inofficioso testamento*, only one-fourth is to be distributed among all proportionally, that is, each is to have the fourth of his proper share.

D. v. 2. 8. 6 and 8; D. v. 2. 25. pr.; C. iii. 28. 29; C. iii. 35. 2.

If the *donatio inter vivos* had been made on the express condition that it should be reckoned as part of the *quarta legitima* (D. v. 2. 25; C. iii. 28. 35), or had been advanced for the purchase of a military rank (C. iii. 28. 30), or was such as unduly to diminish the testator's property, then it was taken into account in estimating how much the recipient was entitled to as his fourth; but, generally speaking, as it was the receipt of the fourth of that which a person would have received *ab intestato* that excluded him from bringing the action *de inofficioso*, the right to this action could not be taken away by the receipt of gifts, which, having been made *inter vivos*, could not have formed part of the inheritance *ab intestato*.

The words *vel aliis modis*, &c., refer to sums given by parents to their children as part of *dotes*, and to *donationes propter nuptias* (C. iii. 28. 29), which were taken into account in reckoning the amount due as the *portio legitima*.

The right to the action *de inofficioso* might be extinguished, (1) by the person entitled to the *quarta legitima* dying without having manifested an intention to dispute the testament; if he had done so, the right to the action passed to his heirs (D. v. 2. 6. 2); (2) if he had allowed a time, fixed first at two and

subsequently at five years (Cod. Theod. ii. 19. 5), to elapse without bringing the action; and (3) when he had acquiesced directly or indirectly in the testament; as, for instance, by making a contract with the persons instituted, in their capacity as heirs (D. v. 2. 20), or by a demand against those persons for the payment of a legacy, or by desisting in the action when once brought. (D. v. 2. 8. 1.)

Justinian, in his Novels, introduced considerable changes in the law on these points. First, if those entitled to the *portio legitima* were more than four in number, they divided between them one-half of the whole inheritance; if they were four or less than four, they divided between them a third of the whole inheritance. (Nov. 18. 1.) Secondly, those who could claim a *portio legitima* were required to be made heirs, and the testament was not to be upheld because those entitled to the *portio legitima* had something otherwise given them, as by legacy or trust. (Nov. 115. 3. 4.) Thirdly, if the testament was declared inofficious, it was only the institution of the heir or heirs that was to be set aside; the trusts, legacies, gifts of liberty, and appointments of tutors were to remain good. (Nov. 115. 4. 9.) And, fourthly, Justinian fixed and specified the reasons, such as attempts on the testator's life, accusing him of grave crime, &c., limiting them to fourteen in the case of descendants and to a less number in other cases, for any one of which a testator might disinherit or omit his descendants or ascendants or brothers or sisters; the one on which the testator had acted was to be expressly stated. (Nov. 115. 3. 4.)

TIT. XIX. DE HEREDUM QUALITATE ET DIFFERENTIA.

Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.

Heirs are said to be *necessarii, sui et necessarii,* or *extranei.*

GAI. ii. 152.

1. Necessarius heres est servus heres institutus: ideo sic appellatur, quia, sive velit sive nolit, omnimodo post mortem testatoris protinus liber et necessarius heres fit. Unde qui facultates suas suspectas habent, solent servum suum primo aut secundo vel etiam ulteriore gradu heredem instituere, ut, si creditoribus satis non fiat, potius ejus heredis bona quam ipsius testatoris a creditoribus possideantur vel distrahantur vel inter eos dividantur. Pro hoc tamen incommodo illud ei commodum præstatur, ut ea, quæ post mortem patroni sui sibi adquisierit, ipsi reserventur: et quamvis non

1. A necessary heir is a slave instituted heir; and he is so called, because, whether he wishes or not, at the death of the testator he becomes instantly free, and necessarily heir; he, therefore, who suspects that he is not in solvent circumstances, commonly institutes his slave to be his heir in the first, second, or some more remote place; so that, if he does not leave a sum equal to his debts, it may be the goods of this heir, and not those of the testator himself, that are seized or sold by his creditors, or divided among them. But, to compensate for this inconvenience, a slave enjoys the advantage of having reserved to him

sufficiant bona defuncti creditoribus, iterum ex ea causa res ejus, quas sibi adquisierit, non veneunt.

whatever he has acquired after the death of his patron; for although the goods of the deceased should be insufficient for the payment of his creditors, yet property so acquired by the slave is not on that account made the subject of a further sale.

GAI. ii. 153-155; D. xlii. 6. 1. 17.

The sale of goods for the payment of debts brought on the debtor an ignominy which a testator was very anxious his memory should escape.

The *heres necessarius* was legally bound by all the debts of the deceased; but the prætor made a change in the strict law, and permitted the goods of the deceased to be distinctly separated from the possessions of the *heres necessarius*, if the *heres necessarius* demanded, before in any way interfering with the goods of the deceased, that this separation should take place. When it did take place, the creditors could only recover from him the amount of what actually came into his hands as heir, while he could deduct from the inheritance all that he had acquired after he became *sui juris* (D. xlii. 6. 1. 18); and (as Ulpian in the passage quoted goes on to say) anything due to him from the testator, which Demangeat suggests, refers to the case of a gift by a third person of a legacy to a slave, *si liber factus fuerit*, in a testament of which the testator had been instituted heir.

This *beneficium separationis*, it may be mentioned, the right to have the goods of the heir separated from those of the testator, was sometimes accorded, in cases having nothing to do with a *heres necessarius*, in favour of the creditors of the testator. The heir might be insolvent, and then it was for their interest that the testator's property should be kept distinct. (D. xlii. 6. 1. 17.)

2. Sui autem et necessarii heredes sunt veluti filius, filia, nepos neptisque ex filio et deinceps ceteri liberi, qui modo in potestate morientis fuerint. Sed ut nepos neptisve sui heredes sint, non sufficit, eum eamve in potestate avi mortis tempore fuisse, sed opus est, ut pater ejus vivo patre suo desierit suus heres esse, aut morte interceptus aut qualibet alia ratione liberatus potestate: tunc enim nepos neptisve in locum patris sui succedit. Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt et vivo quoque patre quodammodo domini existimantur. Unde etiam, si quis intestatus mortuus sit, prima causa est in successione liberorum. Necessarii vero ideo dicuntur, quia omnimodo, sive velint sive nolint, tam ab intestato quam ex testa-

2. Heirs are *sui et necessarii*, when they are, for instance, a son, a daughter, a grandson or granddaughter, by a son or other direct descendants, provided they are in the power of the deceased at the time of his death. That grandchildren should be *sui heredes*, it is not enough that they were in the power of their grandfather at the time of his decease, but it is also requisite that their father should have ceased to be a *suus heres* in the lifetime of his father, having been either cut off by death, or otherwise freed from paternal authority; for then the grandson or granddaughter succeeds into the place of their father. *Sui heredes* are so called because they are family heirs, and, even in the lifetime of their father, are considered owners of the inheritance in a certain degree. Hence, in case of a person dying intestate his

mento heredes fiunt. Sed his prætor permittit volentibus abstinere se ab hereditate, ut potius parentis quam ipsorum bona similiter a creditoribus possideantur.

children are first in succession. They are called necessary heirs, because, whether they wish or not, whether under a testament or in a succession *ab intestato*, they become heirs. But the prætor permits them to abstain from the inheritance if they wish, so that the goods may be taken possession of by the creditors rather as those of their ascendant than as belonging to them.

GAI. ii. 156-158.

There is no difficulty in understanding either who were *sui heredes*, or what was the position they occupied with reference to the inheritance. If the *paterfamilias* had no power of making a testament, those persons in his power, who became *sui juris* at his death, would necessarily have had the inheritance at his decease; they were in a manner, as the text says, owners during his lifetime of the inheritance, which must actually come into their possession at his death. And, although testaments were allowed to alter the legal succession, the rights of those who had this interest in the inheritance were so far guarded that it was necessary expressly to disinherit them in order to deprive them of their interest; while, on the other hand, if the testator appointed any one of them as his heir, he was considered thereby to exercise his *patria potestas*, so that the *suus heres* could not exercise any option as to accepting or refusing the inheritance, and was a *heres necessarius*, exactly as he was if he succeeded *ab intestato*, until the prætor interfered to enable him to escape the burden. In every case the *suus heres* took the inheritance or his share in it, and without any act or exercise of his own will; if he was insane or under the age of puberty, no authority was needed to enable him to accept it, and he never had to enter formally on an inheritance that belonged to him immediately the *paterfamilias* died, unless he was instituted by the *paterfamilias* only conditionally, and then the inheritance belonged to him immediately on the condition being fulfilled. If the grandson, instituted while his father was disinherited, was in the power of the deceased at the time of his death, be became *suus heres et necessarius*, but becoming, on the testator's death, in the power of his own father, immediately placed his father in the position he himself occupied—*patrem suum sine aditione heredem faciet et quidem necessarium.* (D. xxix. 2. 6. 5.)

The inheritance was, according to the notions of early law, the property not so much of the individual, as of the family, and so the term *sui heredes* means persons who took an inheritance that was their own, who were heirs not of the *paterfamilias*, but of themselves, and being, as Cujacius expresses it by a Greek equivalent, *αὐτοκληρονόμοι*, took what thus belonged to them already, and only received possession of that over which, as the

text says, they had even in the lifetime of the parent had a kind of ownership.

As the text informs us, the prætor interposed to prevent its being in every case obligatory on the *suus heres* to accept the inheritance; he was only treated as an heir if he intermeddled with the inheritance; and until he had in some way shown his intention of doing so, the prætor refused to permit any action to be brought against him as *suus heres* by the creditors of the deceased. The *beneficium abstinendi*, as this power of abstaining was termed, differed from the *beneficium separationis*, accorded to slaves, by no express demand being necessary, as it always existed in the absence of express intention to accept the inheritance, and also by its being a protection to the *suus heres* against all actions whatever brought against him in his capacity of heir, while the slave was liable to the amount of the property of the deceased.

The *suus heres* who had availed himself of this privilege did not thereby cease to be heir. He could afterwards within three years accept the inheritance if the goods were not sold by the creditors. (D. xxviii. 8. 8; C. vi. 31. 6.)

The *suus heres* might thus, under the prætorian system, abstain from taking the inheritance; but, until his position was changed by Justinian (as noticed in the sixth paragraph), if he entered he took upon himself all the burdens of the inheritance. He had to satisfy the creditors of the deceased, whether the inheritance sufficed or not, and to pay legatees and discharge *fideicommissa* (with the deduction of the Falcidian fourth) so far as the inheritance was sufficient. If there was more than one heir, each co-heir was, under the law of the Twelve Tables, regarded as answerable for the same proportion of the debts as he took of the inheritance. (D. xxxi. 1. 33; C. iii. 36. 6.)

3. Ceteri, qui testatoris juri subjecti non sunt, extranei heredes appellantur. Itaque liberi quoque nostri, qui in potestate nostra non sunt, heredes a nobis instituti, extranei heredes videntur. Qua de causa et qui heredes a matre instituuntur, eodem numero sunt, quia feminæ in potestate liberos non habent. Servus quoque a domino heres institutus et post testamentum factum ab eo manumissus eodem numero habetur.

3. All those who are not subject to the power of the testator are termed *extranei heredes:* thus, children, not within our power, whom we institute heirs, are accordingly *extranei heredes.* So, too, are children instituted heirs by their mother, for a woman has not her children under her power. A slave also, whom his master has instituted heir and manumitted after the testament has been made, is considered a *heres extraneus.*

GAI. ii. 161.

4. In extraneis heredibus illud observatur, ut sit cum eis testamenti factio, sive ipsi heredes instituantur, sive hi, qui in potestate eorum sunt. Et id duobus temporibus inspicitur, testamenti quidem facti, ut constit-

4. As to *extranei heredes*, the rule is that there must be *testamenti factio* with them, whether they are instituted heirs themselves, or whether those under their power are instituted. And this is required at two several

erit institutio, mortis vero testatoris, ut effectum habeat. Hoc amplius et cum adit hereditatem, esse debet cum eo testamenti factio, sive pure sive sub condicione heres institutus sit: nam jus heredis eo vel maxime tempore inspiciendum est, quo adquirit hereditatem. Medio autem tempore inter factum testamentum et mortem testatoris vel condicionem institutionis existentem mutatio juris heredi non nocet, quia, ut diximus, tria tempora inspici debent. Testamenti autem factionem non solum is habere videtur, qui testamentum facere potest, sed etiam qui ex alieno testamento vel ipse capere potest vel alii adquirere, licet non potest facere testamentum. Et ideo et furiosus et mutus et postumus et infans et filiusfamilias et servus alienus testamenti factionem habere dicuntur: licet enim testamentum facere non possunt, attamen ex testamento vel sibi vel alii adquirere possunt.

times: at the making of the testament, that the institution may be valid, and at the testator's death, that it may take effect. Further, at the time of entering upon the inheritance, *testamenti factio* ought still to exist with the heir, whether he is instituted simply or conditionally; for his capacity as heir is principally regarded at the time of acquiring the inheritance. But in the interval between the making of the testament and the death of the testator, or the accomplishment of the condition of the institution, the heir will not be prejudiced by change of *status;* because it is the three points of time which we have noted that are to be regarded. Not only is a man who can make a testament said to have *testamenti factio*, but also any person who under the testament of another can take for himself, or acquire for another, although he cannot himself make a testament; and therefore insane and dumb persons, posthumous children, infants, sons in power, and slaves belonging to others, are said to have *testamenti factio.* For although they cannot make a testament, yet they can acquire by testament either for themselves or others.

D. xxviii. 5. 49. 1; D. xxviii. 1. 16. 1.

The necessity for the heir having *testamenti factio* at the time of the making of the testament proceeded from the ancient mode of making testaments. When, in the *calata comitia*, the testator orally announced who it was on whom he wished his legal existence, his *persona*, to devolve after his death, the person designated could not have accepted the devolution unless he had been in the enjoyment of those rights of citizenship implied in the *testamenti factio;* and when testaments were made *per æs et libram*, it was equally necessary that the purchaser, that is, the heir, should have those rights of citizenship which would enable him to go through a sale by mancipation.

Vel condicionem. The point of time to be looked to is not that when the testator died, but that when the rights of the heir accrued. If the testament was made *pure*, they accrued the moment the testator died; if made *sub condicione*, on the accomplishment of the condition.

It will be observed that the text says that it was immaterial whether the heir preserved his *testamenti factio* between the two periods of the making the testament and the accruing of his rights; if he lost it between the two later epochs, viz. the accruing of his rights and the entrance on the inheritance, he could not take,

and it would not avail him that he had recovered it at the time of entering on the inheritance. (D. xxviii. 2. 29. 5.)

The classes mentioned in the concluding portion of this paragraph might have the rights of citizenship, and only be accidentally prevented from exercising those rights.

5. Extraneis autem heredibus deliberandi potestas est de adeunda hereditate vel non adeunda. Sed sive is, cui abstinendi potestas est, immiscuerit se bonis hereditariis, sive extraneus, cui de adeunda hereditate deliberare licet, adierit, postea relinquendæ hereditatis facultatem non habet, nisi minor sit annis viginti quinque: nam hujus ætatis hominibus sicut in ceteris omnibus causis deceptis, ita et si temere damnosam hereditatem susceperint, prætor succurrit.

5. *Extranei heredes* may deliberate whether they will enter upon the inheritance or not. But, if one, who has the liberty of abstaining, intermeddles with the property of the inheritance, or an *extraneus heres*, who is permitted to deliberate, enters on the inheritance, it will not afterwards be in his power to renounce the inheritance, unless he shall be under twenty-five years; for the prætor, as in all other cases he relieves persons of this age who have been deceived, so too he does when they have rashly taken upon themselves a burdensome inheritance.

GAI. ii. 162, 163.

There was no fixed time within which it was necessary that the heir should decide whether to accept or reject the inheritance, excepting when the testator fixed the time himself by what was termed *cretio*. (See note to paragr. 7.) Those who were interested in his making a decision could compel him by action to do so, and the prætor then, if he wished, allowed him time to deliberate, never less than one hundred days. Justinian enacted that the time given should not exceed nine months, or, as a special favour from the emperor, a year. If he did not decide within the appointed time, he was taken to have rejected the inheritance, if the action to compel a decision was brought by substituted heirs or a *heres ab intestato;* to have accepted it, if the action was brought by legatees or creditors. If he died before the expiration of the time, and within a year of the first commencement of his right to enter on the inheritance, his heir could, during the unexpired remainder of the time, decide in his place. (C. vi. 30. 19.)

The mode by which the prætor interfered for the protection of minors was called *restitutio in integrum.* (See note on Bk. i. Tit. 23. pr.)

6. Sciendum tamen est, divum Hadrianum etiam majori viginti quinque annis veniam dedisse, cum post aditam hereditatem grande æs alienum, quod aditæ hereditatis tempore latebat, emersisset. Sed hoc divus quidem Hadrianus speciali beneficio cuidam præstitit; divus autem Gordianus postea in militibus tantummodo hoc extendit: sed nostra benevolentia commune omni-

6. The Emperor Hadrian, however, once gave permission to a person above twenty-five years to relinquish an inheritance, when it appeared to be encumbered with a great debt, which was unknown at the time that he entered on the inheritance. But this was granted as a special favour to a particular person. The Emperor Gordian afterwards extended this privilege, but only to soldiers. But

bus subjectis imperio nostro hoc præstavit beneficium et constitutionem tam æquissimam quam nobilem scripsit, cujus tenorem si observaverint homines, licet eis adire hereditatem et in tantum teneri, in quantum valere bona hereditatis contingit, ut ex hac causa neque deliberationis auxilium eis fiat necessarium, nisi omissa observatione nostræ constitutionis et deliberandum existimaverint et sese veteri gravamini aditionis supponere maluerint.

we in our goodness have rendered this benefit common to all our subjects, having dictated a constitution as just as it is illustrious, by which, if heirs will attend to its provisions, they may enter upon their inheritance, and not be liable beyond the value of the goods; so that they need not have recourse to deliberation, unless, neglecting to conform to our constitution, they prefer to deliberate and submit themselves to the liabilities attending the entering on the inheritance under the old law.

GAI. ii. 163; C. vi. 30. 22.

Commentators have termed the privilege referred to here the *beneficium inventarii*. Within thirty days after the heir became acquainted with his rights, an inventory of the property might be begun, which was to be finished within ninety days from the same time. This inventory was to be made in presence of a *tabellio*, or public notary, and of any parties interested who might wish to be present, or else of three witnesses.

If the heir chose to avail himself of this privilege, he entirely separated the estate of the testator from his own; he could deduct anything that might be owing to him from it, and had to pay to it anything he might owe. He first paid the expenses of the funeral and of the inventory, and then all the creditors in the order in which they sent in their claims. If there was any surplus, he took it; if any deficiency, he was not liable. (C. vi. 30. 22.)

Justinian, by this sweeping change, entirely altered the position of the heir. He was no longer the representative of the deceased, bound to see that the debts of the deceased were paid. His estate and that of the testator were now distinct. He merely distributed the property which the deceased left, and if the deceased owed him anything he was entitled to pay himself as a creditor. Justinian did not, indeed, enact that every heir should hold this new character, but he took away the Falcidian fourth from an heir who did not make an inventory, and left him to pay not only the debts, but the legacies, even if the estate was insufficient for the purpose, so that heirs had every possible motive to accept the new position opened to them. (Nov. 1. 2. 2.)

7. Item extraneus heres, testamento institutus aut ab intestato ad legitimam hereditatem vocatus, potest aut pro herede gerendo vel etiam nuda voluntate suscipiendæ hereditatis heres fieri. Pro herede autem gerere quis videtur, si rebus hereditariis tamquam heres utatur vel vendendo res hereditarias aut prædia colendo locandove et quoquo modo, si voluntatem suam declaret vel re vel verbis de adeunda

7. An *extraneus heres*, instituted heir by testament, or called by law to a legal succession *ab intestato*, may become heir, either by doing some act as heir or even by the mere wish to accept the inheritance. And a man acts as heir if he treats any of the goods of the inheritance as his own, by selling any part, or by cultivating the ground, or letting it, or in any other way declares, either by act or word, his intention to enter on the in-

hereditate, dummodo sciat, eum, in cujus bonis pro herede gerit, testato intestatove obiisse et se ei heredem esse. Pro herede enim gerere est pro domino gerere: veteres enim heredes pro dominis appellabant. Sicut autem nuda voluntate extraneus heres fit, ita et contraria destinatione statim ab hereditate repellitur. Eum, qui mutus vel surdus natus est vel postea factus, nihil prohibet pro herede gerere et adquirere sibi hereditatem, si tamen intellegit, quod agitur.

heritance, provided only that he knows that the person, with respect to whose estate he acts as heir, is dead, testate or intestate, and that he himself is the heir; for to act as heir is to act as proprietor; as the ancients frequently used the term heir to denote the proprietor. But as an *extraneus heres* may become heir by a mere intention, so, on the contrary, by a contrary intention, he is at once barred from the inheritance. Nothing prevents a person who was born deaf or dumb, or subsequently became so, from acting as heir, and acquiring for himself the inheritance, if only he knows what is done.

GAI. ii. 166, 167, 169; D. xxix. 2. 5.

Besides the two modes here mentioned of ascertaining the entrance of the *extraneus heres* on the inheritance, namely, forming an intention to do so, and doing some act as heir, there was a mode, abolished by a constitution of Arcadius, Honorius, and Theodosius (A.D. 407), called *cretio*. *Cretio appellata est, quia cernere est quasi decernere et constituere.* (GAI. ii. 164.) The testator himself, in his will, fixed the time within which the heir was to decide whether he would accept the inheritance. The form ran thus: *Titius heres esto cernitoque in diebus centum proximis quibus scieris poterisque.* If the words *quibus scieris poterisque* were inserted, the time ran from the period when the heir became acquainted with his rights, and could avail himself of them; this was called the *cretio vulgaris*. If they were omitted, the time ran from the period when the rights accrued to him; this was called the *cretio continua*, because the time ran on continuously whether the heir knew of his rights or not. The heir could alter his decision at any time within the limited period. His decision was expressed, when made, by forms more solemn than when the *aditio* was made by a simple declaration of intention. (Vide GAI. *in loc. cit.* ULP. *Reg.* xxii. 27 *et seq.*)

The heir was said *adire hereditatem* whenever he in any way entered on the inheritance, whether by doing some act as heir (*pro herede gerere*) or by the mere intention to be heir (*nuda voluntate*). Of course this intention would be manifested in some way or other; but it was the formation, not the expression, of the intention that constituted the entrance on the inheritance. Properly speaking, one person could not enter on an inheritance for another; but there were necessarily exceptions, such as that a tutor might accept an inheritance in behalf of his infant pupil. Noone could enter on part of the inheritance, nor could he enter conditionally, or for a certain time. Directly he did enter, he was, under the law before Justinian, clothed with the *persona* of the deceased, whom he represented as if he had succeeded immediately on his death. (D. xxix. 2. 54.)

TIT. XX. DE LEGATIS.

Post hæc videamus de legatis. Quæ pars juris extra propositam quidem materiam videtur: nam loquimur de his juris figuris, quibus per universitatem res nobis adquiruntur. Sed cum omnino de testamentis deque heredibus, qui testamento instituuntur, locuti sumus, non sine causa sequenti loco potest hæc juris materia tractari.

We will now proceed to treat of legacies. This part of the law may not seem to fall within our present subject, namely, the discussion of those methods by which things are acquired *per universitatem;* but, as we have already spoken of all points concerning testaments and testamentary heirs, we may not improperly pass to the subject of legacies.

GAI. ii. 191.

A legacy, being a mode by which the property in one or more particular things is acquired, ought not, properly, to be discussed in the part of the Institutes devoted to the discussion of the modes of acquiring a *universitas rerum.*

In Roman law a legacy was that part of the inheritance which the heir is enjoined to pay or give over to a third person—*Legatum quod legis modo, id est imperative, testamento relinquitur.* (ULP. *Reg.* 24. 1.) Without an heir there could be no legacy; and therefore, if no instituted heir entered on the inheritance, the gift of the legacy was useless. The term was never applied, as in English law, to a direct bequest.

1. Legatum itaque est donatio quædam a defuncto relicta.

1. A legacy is a kind of gift left by a deceased person.

D. xxxi. 36.

2. Sed olim quidem erant legatorum genera quattuor: per vindicationem, per damnationem, sinendi modo, per præceptionem: et certa quædam verba cuique generi legatorum adsignata erant, per quæ singula genera legatorum significabantur. Sed ex constitutionibus divorum principum sollemnitas hujusmodi verborum penitus sublata est. Nostra autem constitutio, quam cum magna fecimus lucubratione, defunctorum voluntates validiores esse cupientes et non verbis sed voluntatibus eorum faventes, disposuit, ut omnibus legatis una sit natura et, quibuscumque verbis aliquid derelictum sit, liceat legatariis id persequi non solum per actiones personales, sed etiam per in rem et per hypothecariam: cujus constitutionis perpensum modum ex ipsius tenore perfectissime accipere possibile est.

2. Formerly, there were four kinds of legacies, namely, *per vindicationem, per damnationem, sinendi modo,* and *per præceptionem.* There was a certain form of words proper to each of these, by which they were distinguished one from another. But these solemn forms have been wholly suppressed by imperial constitutions. We also, desirous of giving respect to the wishes of deceased persons, and regarding their intentions more than their words, have, by a constitution composed with great study, enacted that the nature of all legacies shall be the same, and that legatees, whatever may be the words employed in the testament, may sue for what is left them, not only by a personal, but by a real, or an hypothecary action. The well-weighed scheme of this constitution may be easily seen by a perusal of its dispositions.

GAI. ii. 192-223; C. vi. 37. 21; C. vi. 43. 1.

Per vindicationem. The formula in this species of legacy ran thus: '*Hominem Stichum do lego,*' or '*do*'; or '*capito sumito, sibi habeto*'. The legacy was said to be *per vindicationem,* because, immediately on the heir entering on the inheritance, the subject of the legacy became the property of the legatee *ex jure Quiritium,* who could accordingly claim it by *vindicatio.* The testator could only give, in this way, things of which he had the *dominium ex jure Quiritium,* both at the time of making the testament and of his death; excepting that such *dominium* at the time of death alone was sufficient when the subject of the legacy was anything appreciable by weight, number, or measure, as wine, oil, money, &c. (GAI. ii. 193-200.)

Per damnationem. The formula ran thus: '*Heres meus damnas esto dare*'; or '*Dato, facito, heredem meum dare jubeo*'. The legatee did not, by this legacy, become proprietor of the subject of the legacy; but he had a personal action against the heir to compel him to give (*dare*), to procure (*præstare*), or to do (*facere*), that which the terms of the legacy directed. Anything could be given by this legacy that could become the subject of an obligation, whether the property of the testator, the heir, or any one else. The rights it gave were, therefore, said to be the *optimum jus legati.* (ULP. *Reg.* 24. 11.) (GAI. ii. 200-208.)

Sinendi modo. The formula of this kind of legacy was: '*Heres meus damnas esto sinere Lucium Titium sumere illam rem sibique habere*'. (ULP. *Reg.* xxiv. 5.) The heir is to allow the legatee to take the thing given. This form, then, was applicable to anything that belonged to the testator or to the heir, but not to anything belonging to a third person. The legatee did not become the owner of the thing given until he took possession. If the heir refused to allow the legatee to take possession, the legatee might compel him to do so by the personal action termed '*Quicquid heredem ex testamento dare facere oportet*'. (GAI. ii. 209-215.)

Per præceptionem. The formula ran: '*Lucius Titius illam rem præcipito*' (i.e. take beforehand). The proper application of this form was to a gift, made to one already instituted co-heir, of some part of the inheritance which he was to take as legatee before receiving his share as heir. The heir could enforce his claim to this something beyond his share by the action termed *judicium familiæ erciscundæ,* i.e. for having the inheritance portioned out by a judge, who assigned the thing given by the legacy to the heir as legatee. It was only by a mistake in language that this form was applied to a gift to a person not an heir, and to a gift of something not forming part of the inheritance; but a gift made in this form to a person not heir was not void; for the *senatusconsultum Neronianum,* about A.D. 60, made every such legacy valid as a legacy *per damnationem.* Gaius mentions that the Proculians attempted to get over the difficulty where the word *præcipito* was used to give a legacy to a person not heir, by reading '*præcipito*' as '*capito*'; and this construction was apparently confirmed by a constitution of Hadrian. (GAI. ii. 216-222.)

Under the imperial legislation the value attached to these *formulæ* was gradually lessened. By the *senatusconsultum Neronianum* it was enacted that any legacy given in a form of words not suited to the gift intended should be as valid as one given in the form most favourable to the legatee; '*ut quod minus aptis verbis legatum est perinde sit ac si optimo jure legatum esset*'. (ULP. *Reg.* 24. 11; GAI. ii. 197. 218.) The *formulæ* remained, but a mistake in their use could no longer injure the legatee; and in every case the legacy, however expressed, had the effect of a legacy given *per damnationem*. In A.D. 342 a constitution of Constantius and Constans abolished the use of *formulæ* in all legal acts. (C. ii. 58. 1.) The division of legacies still theoretically remained, but the appropriate *formulæ* were no longer in use. Finally Justinian, as we see in the text, enacted that all legacies should be of the same nature, and that the legatee might enforce the legacy by personal, real, or hypothecary actions, according to the nature of the gift.

3. Sed non usque ad eam constitutionem standum esse existimavimus. Cum enim antiquitatem invenimus legata quidem stricte concludentem, fideicommissis autem, quæ ex voluntate magis descendebant defunctorum, pinguiorem naturam indulgentem, necessarium esse duximus omnia legata fideicommissis exæquare ut nulla sit inter ea differentia, sed quod deest legatis, hoc repleatur ex natura fideicommissorum et, si quid amplius est in legatis, per hoc crescat fideicommissi natura. Sed ne in primis legum cunabulis permixte de his exponendo studiosis adulescentibus quandam introducamus difficultatem, operæ pretium esse duximus, interim separatim prius de legatis et postea de fideicommissis tractare, ut natura utriusque juris cognita, facile possint permixtionem eorum eruditi suptilioribus auribus accipere.

3. We have not, however, judged it expedient to confine ourselves within the limits of this constitution; for, observing that the ancients confined legacies within strict rules, but accorded a greater latitude to *fideicommissa* as arising more immediately from the wishes of the deceased, we have thought it necessary to make all legacies equal to *fideicommissa*, so that no difference may remain between them. Whatever is wanting to legacies they will borrow from *fideicommissa*, and communicate to them any superiority they themselves may have. But, that we may not raise difficulties, and perplex the minds of young persons at their entrance upon the study of the law, by explaining these two subjects jointly, we have thought it worth while to treat separately, first of legacies and then of *fideicommissa*, that, the nature of each being known, the student, thus prepared, may understand them with keener appreciation when mixed up the one with the other.

C. vi. 43. 2.

All that remained, after the changes noticed in the text, to distinguish legacies from *fideicommissa*, was the general character of the expressions used. If they were imperative, the gift was a legacy: if they assumed the form of a request, and were given *precative*, they were *fideicommissa*. If a gift was in form imperative, but it was not valid as a legacy, it was valid as a *fideicommissum*. If such a gift could be valid as a legacy, it was of course regarded as a legacy, and not as a *fideicommissum*.

A difference still remained with respect to the gifts of liberty to a slave. (Vid. Tit. 24. 2.) A direct legacy of liberty made the slave the *libertus* of the testator; a gift of liberty by a *fideicommissum* made the slave the *libertus* of the *fideicommissarius*.

4. Non solum autem testatoris vel heredis res, sed et aliena legari potest: ita ut heres cogatur redimere eam et præstare vel, si non potest redimere, æstimationem ejus dare. Sed si talis res sit, cujus non est commercium, nec æstimatio ejus debetur, sicuti si campum Martium vel basilicam vel templa vel quæ publico usui destinata sunt, legaverit; nam nullius momenti legatum est. Quod autem diximus, alienam rem posse legari, ita intellegendum est, si defunctus sciebat, alienam rem esse, non et si ignorabat; forsitan enim, si scisset alienam, non legasset: et ita divus Pius rescripsit. Et verius est, ipsum qui agit, id est legatarium, probare oportere, scisse alienam rem legare defunctum, non heredem probare oportere, ignorasse alienam, quia semper necessitas probandi incumbit illi, qui agit.

4. A testator may not only give as a legacy his own property, or that of his heir, but also the property of others. The heir is then obliged either to purchase and deliver it, or, if it cannot be bought, to give its value. But, if the thing given is not in its nature a subject of commerce, or purchasable, the heir is not bound to pay the value to the legatee; as if a man should bequeath the Campus Martius, a basilica, temples, or any of the things appropriated to public purposes: for such a legacy is of no effect. But when we say that a testator may give the goods of another as a legacy, we must be understood to mean, that this can only be done if the deceased knew that what he bequeathed belonged to another, and not if he was ignorant of it; since, if he had known it, he would not perhaps have left such a legacy. To this effect is a rescript of the Emperor Antoninus. It is also the better opinion that it is incumbent upon the plaintiff, that is, the legatee, to prove that the deceased knew that what he left belonged to another, not upon the heir to prove that the deceased did not know it; for the burden of proof always lies upon the person who brings the action.

GAI. ii. 202; D. xxx. 39. 7-10; D. xxxi. 67. 8; C. vi. 37. 10; D. xxii. 3. 21.

A basilica was a building which was used as a court of law, and also as a resort of merchants and men of business.

There are some exceptions to the rule as to the burden of proof; e.g. in some cases where the plaintiff is a minor or a woman. (D. xxii. 3. 25. 1.) Thus in the action of a pupil against a magistrate (Bk. i. Tit. 24. 2), the burden of proof lies on the magistrate. (D. xxvii. 8. 1. 13.)

5. Sed et si rem obligatam creditori aliquis legaverit, necesse habet heres luere. Et hoc quoque casu idem placet, quod in re aliena, ut ita demum luere necesse habeat heres, si sciebat defunctus, rem obligatam esse: et ita divi Severus et Antoninus rescripserunt. Si tamen defunctus voluit legatarium

5. If a testator gives as a legacy anything in pledge to a creditor, the heir is bound to redeem it. But in this case, as in that of the property of another, the heir is not bound to redeem it, unless the deceased knew that the thing was pledged; and this the Emperors Severus and Antoninus have decided by a rescript. But when it

luere et hoc expressit, non debet heres eam luere.

has been the wish of the deceased that the legatee should redeem the thing, and he has expressly said so, the heir is not bound to redeem it.

D. xxx. 57.

6. Si res aliena legata fuerit et ejus, vivo testatore, legatarius dominus factus fuerit, si quidem ex causa emptionis, ex testamento actione pretium consequi potest: si vero ex causa lucrativa, veluti ex donatione vel ex alia simili causa, agere non potest. Nam traditum est, duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse. Hac ratione si ex duobus testamentis eadem res eidem debeatur, interest, utrum rem an æstimationem ex testamento consecutus est: nam si rem, agere non potest, quia habet eam ex causa lucrativa, si æstimationem, agere potest.

6. If a thing belonging to another is given as a legacy, and becomes the property of the legatee in the lifetime of the testator, then, if it becomes so by purchase, the legatee may recover the value by an action founded on the testament; but if the legatee obtained it by any way of clear gain to him, as by gift, or any similar mode, he cannot bring such an action, for it is a received rule, that two modes of acquiring, each being one of clear gain, can never meet in the same person with regard to the same thing. If, therefore, the same thing be given by two testaments to the same person, it makes a difference, whether the legatee has obtained the thing itself, or the value of it, under the first, for, if he has already received the thing itself, he cannot bring an action, since he has received it by a mode of clear gain to him; but, if he has received the value only, he may bring an action.

D. xxx. 108; D. xliv. 7. 17; D. xxx. 34. 2.

It may be observed, that if a person acquired the subject of a legacy by a *causa lucrativa* during the lifetime of the testator, and the legacy was made, not in his own favour directly, but was given to his slave, or a descendant in his power, he could recover the value of the thing given from the heir. In such a case the two *causæ lucrativæ* were not considered so to unite in one person as to violate the general rule, although, in fact, the result was the same as if the rule had been directly violated. (D. xxx. 108.)

In the beginning of this paragraph it is said that if the legatee acquired the thing during the lifetime of the testator by a *causa lucrativa*, he could not regain it or its value by an action. The *vivo testatore* is merely an example; it would be the same if the legatee acquired the thing by a *causa lucrativa* at any time before receiving it by way of legacy. Another instance of the principle is given in the ninth paragraph.

7. Ea quoque res, quæ in rerum natura non est, si modo futura est, recte legatur, veluti fructus, qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit.

7. A thing not in existence, but which one day will be in existence, may be properly given as a legacy, as, for instance, the fruits which shall grow on such a farm, or the child which shall be born of such a slave.

GAI. ii. 203.

8. Si eadem res duobus legata sit sive conjunctim sive disjunctim, si ambo perveniant ad legatum, scinditur inter eos legatum: si alter de-

8. If the same thing is given as a legacy to two persons, either conjointly or separately, and both take the legacy, it is divided between them. But if

ficiat, quia aut spreverit legatum aut vivo testatore decesserit aut alio quolibet modo defecerit, totum ad collegatarium pertinet. Conjunctim autem legatur, veluti si quis dicat 'Titio et Seio hominem Stichum do lego': disjunctim ita 'Titio hominem Stichum do lego, Seio Stichum do lego'. Sed et si expresserit 'eundem hominem Stichum,' æque disjunctim legatum intellegitur.

either of the legatees fails to take it either from refusing it or from dying in the lifetime of the testator, or from any other reason, the whole goes to his co-legatee. A legacy is given conjointly, if a testator says, 'I give as a legacy my slave Stichus to Titius and Seius': but separately, if he says, 'I give as a legacy my slave Stichus to Titius; I give as a legacy my slave Stichus to Seius'. And even if the testator says, that he gives the same slave Stichus, yet the legacy is still taken to be given separately.

GAI. ii. 199.

A legacy might be void originally, when it was said to be taken *pro non scripto*, i.e. as if it had never been inserted; or it might be valid originally, and yet before the rights of the legatee were fixed (i.e. to use the technical term (see note on paragr. 20), before the *dies cedens*) the legatee might die, or refuse the legacy, or become incapable to take, when the legacy was called *irritum* or *destitutum;* or the rights of the legatee might be fixed, but before the legacy was actually delivered over to him, it might be taken away from him on account of something rendering him unworthy to receive it; the legacy was then called *ereptitium* (*quæ ut indignis eripiuntur*). If there were no co-legatees, the legacy, if *ereptitium*, went to the *fiscus;* in the two other cases the failure of the legacy was for the benefit of the heir. The legacies were burdens with which he might have been, but was not, charged.

But if there was a co-legatee the case was different. Co-legatees might be created, according to a division made by Paulus (D. l. 16. 142), *re, re et verbis*, or *verbis;* *re* being equivalent to the *disjunctim* of the text, when the same gift was made separately to two or more persons; *re et verbis*, equivalent to the *conjunctim* of the text, when the same thing was given at once to two or more; and *verbis*, in which the joint legacy was only apparent, the gift being made at once to two or more, but their respective shares being assigned them, as '*lego Titio et Seio ex æquis partibus*'.

The rights of co-legatees were very different at different periods of Roman law. I. Originally the interest of the co-legatee was determined by the formula under which the legacy was given. If it was *per vindicationem*, the right to the property in the whole thing given passed to each legatee. They had to divide it between them, but each had a right, as against the heir, to claim the whole. If one of them failed to take, the whole passed to the other. (GAI. ii. 199.) If it was given *per damnationem*, no right to the property passed, but each legatee was a creditor of the heir in respect of the thing given, and a difference was made according as the thing was given *conjunctim* or *disjunctim*. In the former case, each of the co-legatees, if there were two, was entitled to half only, and if either could not take, his half remained in the inheritance for the benefit of the heir. If the legacy was given *disjunctim*. then each had a

claim against the heir for the whole, and if one got the thing from the heir, the other could get its value. (GAI. ii. 205.) If the legacy was given *sinendi modo*, and *conjunctim*, each could take a half only. If given *disjunctim*, according to some it was as if given *per damnationem;* according to others, if the heir allowed either co-legatee to take the thing, he had done his duty, and the co-legatee got nothing. (GAI. ii. 215.) If the legacy was given *per præceptionem*, the effect as between co-legatees was the same as in the case of legacies given *per vindicationem*. (GAI. ii. 223.)

II. The *lex Julia de maritandis ordinibus* (B.C. 13) and the *lex Papia Poppæa* (A.D. 9), which are usually spoken of as one law, *lex Julia et Papia*, introduced great changes in testamentary law; the former to prevent unequal marriages, as of a senator with a *liberta*, and the latter to promote marriage and the birth of children. Two classes of persons, *cœlibes* and *orbi*, were affected with incapacities. They might be instituted or have legacies given them, i.e. the institution or gift was not void, but the benefit derivable from it was taken away from them and given to some one else. By *cœlebs* was meant a man between the ages of twenty and sixty, or a woman between the ages of twenty and fifty, who had not been married or was a widower or widow. (ULP. *Reg.* 16. 1.) Men had a hundred days from the death of the testator in which they might marry, and thus avoid the penalties attaching to celibacy, and women were allowed two years from the death of a husband, and eighteen months from the time of divorce, in which to remarry. (ULP. *Reg.* 14. and 17. 1.) By *orbus* was meant a man between twenty-five and sixty, and a woman between twenty and fifty, who had not a child living at the time of the accrual of the right to take under the testament. Adoptive children could not be counted, a *senatusconsultum* having been passed to exclude them. The *lex Papia* fixed the time of accrual of rights under a testament, the *dies cedens*, as it was technically termed, at the date of the opening of the testament, instead of the date of the testator's death, which had previously been the legal date.

The *cœlebs* lost all, and the *orbus* one-half, of what was given him, and this lapsed portion (*caducum, veluti ceciderit ab eo*, ULP. *Reg.* 17. 1) was given to some one else. These *caduca* produced by the person to whom they were given not being capable of taking them were not the only interests dealt with by the *lex Papia*. If a gift was originally invalid, as if it was given to a person already dead at the date when the testament was made, the gift was looked on as if it had never been made at all, *pro non scripto*. With such gifts the *lex Papia* had nothing to do. But a gift might have been valid originally and then become invalid, as if, e.g., it had been given to a person who died after the making of the testament and before the death of the testator. The old law prescribed how they should be treated, and gave them by accrual to co-heirs if given to an heir, or allowed them to fall in as part of the inheritance if given to a legatee. Such vacant things, however, were affected by the *lex Papia*. They were said to be *in causa caduci;* and the *caduca*

and the things *in causa caduci* devolved together to those who had the *jus caduca vindicandi.*

In the first place there were certain excepted persons, among others cognates of the testator up to the sixth degree (ULP. *Reg.* 16. 1), who were not affected by the *lex Papia* at all. They lost nothing if they were *cœlibes* or *orbi;* they were said to be *solidi capaces,* capable of taking all the testament gave them. But they did not take *caduca* under the special provisions of the *lex Papia;* therefore if not *patres* they could only get *caduca* by being made substituted heirs. (See note on Title 15.) Ascendants and descendants up to the third degree had greater privileges. They were *solidi capaces,* losing nothing by being *cœlibes* or *orbi;* they could themselves take *caduca* under the *lex Papia;* and they had, moreover, the *jus antiquum,* enjoying the rights of accrual of the old law. (ULP. *Reg.* 18.)

Apart from them it was the *patres* (i.e. persons having a husband or wife and one child living), mentioned in the testament, who took the *caduca* and the things *in causa caduci,* legatees taking before heirs. If there were no persons answering to this description, the *ærarium,* or treasury of the people, as opposed to the *fiscus,* or treasury of the emperor, took them. But the object of the law was not to get money for the treasury, but to reward marriage and the birth of children, and this is why testators were allowed to substitute heirs (who, of course, unless near relations or *patres,* could not take) so as to prevent the *ærarium* taking.

Where there were co-legatees, the *caduca* of co-legatees were given, in the first place, to co-legatees who were *patres;* but it was only those joined *re et verbis,* and those joined *verbis,* who had to be considered for this purpose. For those joined *re* were each entitled to the whole thing, and so any one co-legatee capable of taking was entitled to the whole by the form of the gift. If there were no co-legatees who were *patres,* the legacies went to the heirs who were *patres.* If there were none, then to legatees generally who had children. If none had children, then to the *ærarium.* (GAI. ii. 206, 207, 286.) Any legacy given by the *lex Papia Poppœa* might be refused; if accepted, it passed with all the burdens attaching to it. *Caduca cum suo onere fiunt.* (ULP. *Reg.* 17. 2.) By a constitution of Caracalla (ULP. *Reg.* 17. 2), all *caduca* were given to the *fiscus,* the distinction between the *ærarium* and the *fiscus* having ceased to exist.

III. Constantine abolished the law of incapacity arising from celibacy and *orbitas.* (C. viii. 58.) And Justinian did away with all the law of *caduca* springing out of the *lex Papia Poppœa.* The distinction between the kinds of legacies being no longer in existence, new provisions on the subject were made. (C. vi. 51.) The right to bring a real action was to attach to every legacy; and co-legatees were placed in the position they would have occupied before the *lex Papia Poppœa;* but it was enacted that in every case of a gift to a co-legatee failing, an accrual should take place to the other or others joined with him. If they were joined *re,* the ac-

crual was said to be obligatory on those conjoined ; but the burdens of the legacy did not pass with it. Really there was no accrual at all ; the co-legatees were in the same position as if the gift had only been made to one. If the co-legatees were joined *re et verbis*, the accrual was voluntary, but the burdens of the legacy passed with it. The co-legatees were looked upon as having really distinct interests, and therefore, if the gift to one failed, the others had something to receive. But, at the same time, they took the share they gained, with all its burdens ; it might, for instance, be encumbered with a *fideicommissum*. Legatees joined only *verbis* were not, properly speaking, co-legatees at all, and Justinian does not permit any accrual between them. There was thus a clear distinction made between legacies given jointly to legatees *re et verbis* and those given *verbis*. In both distinct interests were in effect given to all the legatees ; but in the former case these interests were so united that, through the failure of the legacy of one legatee, his interest accrued to those joined with him.

If the rights of a co-legatee were once fixed, then even if he died before he received his legacy, the accrual on any failure still took place for his benefit, or rather that of his representatives, and was said to be given to his *pars* or share. (D. vii. 1. 33. 1.)

9. Si cui fundus alienus legatus fuerit et emerit proprietatem detracto usufructu et ususfructus ad eum pervenerit et postea ex testamento agat, recte eum agere et fundum petere Julianus ait, quia ususfructus in petitione servitutis locum optinet ; sed officio judicis contineri, ut deducto usufructu jubeat æstimationem præstari.

9. If a testator gives as a legacy land belonging to another, and the legatee purchases the bare ownership minus the usufruct, and the usufruct comes to him, and he afterwards brings an action under the testament, Julian says that an action claiming the land is well brought, because, in this claim, the usufruct is regarded as a servitude only. But it is the duty of a judge, in this case, to order the value of the property, deducting the usufruct, to be paid.

D. xxx. 82. 2. 3 ; D. l. 16. 25.

A *fundus*, or landed estate, is left by legacy ; the legatee buys the naked ownership, but receives by a *causa lucrativa* (this is expressed by *pervenerit*) the usufruct. He is, of course, entitled to receive the value of what he has bought, but not of that which has already come to him by a *causa lucrativa*. Supposing he wishes to recover by action the value of the naked ownership from the heir, he can only demand exactly that which was given him by the testament. He therefore asks for the *fundus ;* but the *fundus* includes both the naked ownership and the usufruct. Will he not then be asking too much, and thus fail in his action from what was termed *plus petitio ?* (See Bk. iv. Tit. 6. 33.) Julian answers that he will not, because in every demand of a *fundus* the plaintiff must necessarily ask for it, subject to all its servitudes. Usufruct was a servitude, and therefore, in demanding the *fundus* from the heir, he does not demand the usufruct, if the *fundus* is subject to such a servitude.

10. Sed si rem legatarii quis ei legaverit, inutile legatum est, quia quod proprium est ipsius, amplius ejus fieri non potest: et licet alienaverit eam, non debetur nec ipsa nec æstimatio ejus.

10. If a testator gives as a legacy anything that already belongs to the legatee, the legacy is useless; for what is already the property of a legatee cannot become more so. And, although the legatee has parted with the thing bequeathed, he would not be entitled to receive either the thing itself or its value.

D. xxx. 41. 2.

Et licet alienaverit eam. This is an application of what was called the rule of Cato, *regula Catoniana* (perhaps Cato Major), viz. *Quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum quandocumque decesserit non valere* (D. xxxiv. 7. 1. pr.), i.e. a legacy invalid when the testament was made, could never become valid.

11. Si quis rem suam quasi alienam legaverit, valet legatum: nam plus valet, quod in veritate est, quam quod in opinione. Sed et si legatarii putavit, valere constat, quia exitum voluntas defuncti potest habere.

11. If a testator gives a thing belonging to himself, as if it was the property of another, the legacy is valid; for its validity is decided by what is the real state of the case, not by what he thinks. And if the testator imagines that what he gives belongs already to the legatee, yet, if it does not, the legacy is certainly valid, because the wish of the deceased can thus take effect.

D. xl. 2. 4. 1.

Quasi alienam: in the converse case the legacy is bad (par. 4). The words '*plus valet quod,*' &c., are not the statement of a general rule of law, but merely of what happens under the particular circumstances referred to. Under other circumstances, exactly the opposite is laid down. Ulpian says, for instance, that a person thinking himself a *necessarius heres,* but really not being so, could not repudiate the inheritance, *nam plus est in opinione quam in veritate.* (D. xxix. 2. 15.)

12. Si rem suam legaverit testator posteaque eam alienaverit, Celsus existimat, si non adimendi animo vendidit, nihilo minus deberi, idque divi Severus et Antoninus rescripserunt. Iidem rescripserunt, eum, qui post testamentum factum prædia, quæ legata erant, pignori dedit, ademisse legatum non videri et ideo legatarium cum herede agere posse, ut prædia a creditore luantur. Si vero quis partem rei legatæ alienaverit, pars, quæ non est alienata, omnimodo debetur, pars autem alienata ita debetur, si non adimendi animo alienata sit.

12. If a testator gives his own property as a legacy, and afterwards alienates it, it is the opinion of Celsus that the legatee is entitled to the legacy, if the testator did not sell with an intention to revoke the legacy. The Emperors Severus and Antoninus have published a rescript to this effect. And they have also decided by rescript, that if any person, after making his testament, pledges immoveables which he has given as a legacy, he is not to be taken to have thereby revoked the legacy; and that the legatee may, by bringing an action against the heir, compel him to redeem the property. If, again, a part of the thing given as a legacy is alienated, the legatee is of course still entitled

to the part which remains unalienated, but is entitled to that which is alienated only if it appears not to have been alienated with the intention of taking away the legacy.

GAI. ii. 198; D. xxxii. 11. 12; C. vi. 37. 3; D. xxx. 8. pr.

Gaius informs us that the opinion confirmed by Severus and Antoninus was not that generally entertained when he wrote. When the legacy was given *per vindicationem*, it seemed impossible that if the thing was alienated the legatee could take anything; and even if it was *per damnationem*, though there was nothing in the nature of the legacy to prevent the legatee making a valid claim (*licet ipso jure debeatur legatum*), it was considered that he might be repelled by an exception, because he would be acting against the wishes of the deceased. (GAI. ii. 198.)

13. Si quis debitori suo liberationem legaverit, legatum utile est et neque ab ipso debitore neque ab herede ejus potest heres petere nec ab alio, qui heredis loco est: sed et potest a debitore conveniri, ut liberet eum. Potest autem quis vel ad tempus jubere, ne heres petat.

13. If a testator gives as a legacy to his debtor a discharge from his debt, the legacy is valid, and the heir cannot recover the debt from the debtor, his heir, or any one in the place of his heir. The debtor may by action compel the heir to free him from his obligation. A man may also forbid his heir to demand payment of a debt during a certain time.

D. xxxiv. 3. pr. and 3; D. xxxiv. 8. 1.

The debt was not extinguished by the legacy of *liberatio*. But if the heir sued the debtor, then the debtor could repel him by the plea of fraud (*exceptione doli mali*), and, if the debtor wished, he could, by suing under the testament, compel the heir to release the debt, by consent only, if the obligation had been made in that manner, by *acceptilatio*, i.e. by the heir acknowledging the receipt of the thing owed (see Bk. iii. Tit. 29. 1), if it had not.

A discharge from debt might be made indirectly by giving as a legacy to the debtor the *chirographum*, or bond by which he was bound; it would be valid *quasi pro fideicommisso*. (D. xxxiv. 3. 3. 1, 2.)

Vel ad tempus. The effect of such a legacy was that if the heir sued the legatee before the time had expired, he could be repelled by an exception of *dolus malus*.

14. Ex contrario si debitor creditori suo quod debet, legaverit, inutile est legatum, si nihil plus est in legato quam in debito, quia nihil amplius habet per legatum. Quodsi in diem vel sub condicione debitum ei pure legaverit, utile est legatum propter repræsentationem. Quodsi vivo testatore dies venerit aut condicic extiterit, Papinianus scripsit, utile esse nihilo minus legatum, quia semel constitit. Quod et ver-

14. Conversely, a legacy given by a debtor to his creditor of the money which he owes him, is ineffectual if it includes nothing more than the debt did, for the creditor thus receives no benefit from the legacy. But if a debtor gives absolutely as a legacy to his creditor what was due only on the expiration of a term or on the accomplishment of a condition, the legacy is effectual, because it thus becomes due before the debt. Papinian decides,

um est: non enim placuit sententia existimantium, extinctum esse legatum, quia in eam causam pervenit, a qua incipere non potest.

that if the term expires, or the condition is accomplished, in the lifetime of the testator, the legacy is nevertheless effectual, because it was once good; which is true. For we reject the opinion that a legacy once good afterwards becomes extinct, because circumstances have arisen which would have prevented its being originally valid.

D. xxxv. 2. 1. 10; D. xxxv. 2. 5; D. xxxi. 82. pr.

15. Sed si uxori maritus dotem legaverit, valet legatum, quia plenius est legatum quam de dote actio. Sed si quam non acceperit dotem legaverit, divi Severus et Antoninus rescripserunt, si quidem simpliciter legaverit, inutile esse legatum: si vero certa pecunia vel certum corpus aut instrumentum dotis in prælegando demonstrata sunt, valere legatum.

15. If a man gives as a legacy to his wife her *dos*, the legacy is valid, for the legacy is more beneficial than the action she might maintain for the recovery of her *dos*. But if he bequeaths to his wife her *dos*, which he has never actually received, the Emperors Severus and Antoninus have decided by a rescript, that if the *dos* is given without any specification, the legacy is void; but if in the terms of the gift a particular sum or thing, or a certain sum mentioned in the dotal act, is specified as to be received as a legacy before it could be received as *dos*, the legacy is valid.

D. xxxiii. 4. 1. 2, 7, 8.

In the *de dote*, or, as it was otherwise called, the *rei uxoriæ actio*, certain delays in the restitution of the dowry were permitted; and sums expended for the improvement of the property of the wife might be set off against the claim. The legacy had to be paid without delay, and no set-off was admissible. It was from the dowry being thus restored, when made the subject of a legacy, sooner than when the action was brought, that the expression *prælegare dotem* was used; the *dos* was given by legacy (*legare*) sooner (*præ*) than it could otherwise be obtained.

By the words '*certa pecunia*,' &c., is meant that if the testator said, 'I give to my wife the sum she brought me as dowry,' and she had not brought anything, the legacy would be useless; but if he said, 'I give her the 100 *aurei* she brought me,' then the words referring to her having brought them would be only a *falsa demonstratio*, that is, an unnecessary particularity of expression, which would be passed over as if not written. (C. vi. 44. 3.)

Instrumentum dotis. So, if the testator said, 'I give the property mentioned in the act of dowry,' if there was no act of dowry, the gift would be useless; but if he said, 'I give such or such a particular thing mentioned in the act of dowry,' if there was no act of dowry, the wife would receive the thing specified, and the words, 'mentioned in the act of dowry,' would be treated as superfluous.

16. Si res legata sine facto heredis perierit, legatario decedit. Et si servus alienus legatus sine facto

16. If a thing given as a legacy perishes without the act of the heir, the loss falls upon the legatee. And,

heredis manumissus fuerit, non tenetur heres. Si vero heredis servus legatus fuerit et ipse eum manumiserit, teneri eum, Julianus scripsit, nec interest, scierit an ignoraverit, a se legatum esse. Sed et si alii donaverit servum et is, cui donatus est, eum manumiserit, tenetur heres, quamvis ignoraverit, a se eum legatum esse.

if the slave of another, given as a legacy, should be manumitted without the act of the heir, the heir is not answerable. But if a testator gives as a legacy the slave of his heir, who afterwards manumits that slave, Julian says that the heir is answerable, whether he knew or not that the slave was given away from him as a legacy. And it would be the same if the heir had made a present of the slave to any one who had enfranchised him: the heir, though ignorant of the legacy, would be answerable.

D. xxx. 35; D. xxx. 112. 1.

The manumission, of course, is good; it is the *æstimatio* in respect of which the heir is bound.

17. Si quis ancillas cum suis natis legaverit, etiamsi ancillæ mortuæ fuerint, partus legato cedunt. Idem est, si ordinarii servi cum vicariis legati fuerint, ut, licet mortui sint ordinarii, tamen vicarii legato cedant. Sed si servus cum peculio fuerit legatus, mortuo servo vel manumisso vel alienato, et peculii legatum extinguitur. Idem est, si fundus instructus vel cum instrumento legatus fuerit: nam fundo alienato et instrumenti legatum extinguitur.

17. If a testator bequeaths his female slaves and their offspring, although the mothers die, the issue goes to the legatee. And it is the same if ordinary slaves are bequeathed together with vicarial, so that although the ordinary slaves die yet the vicarial slaves will pass by virtue of the gift. But, where a slave is bequeathed with his *peculium*, and afterwards dies, or is manumitted, or alienated, the legacy of the *peculium* becomes extinct. It is the same if the testator gives as a legacy, land 'provided with instruments of use or ornament,' or 'with its instruments of culture'. If the land is alienated, the legacy of the instruments is extinguished.

D. xxxiii. 8. 1, 2, 3, 4; D. xxxiii. 7. 1.

An *ordinarius servus* was a slave who had a special office in the establishment, as cook, barber, baker, &c. The *vicarii* were his attendants, and were generally reckoned as part of his *peculium*. But in the case of this legacy, the law considered them as having an independent existence (*propter dignitatem hominis*), and not merely as accessories to the *ordinarii*. So, the children of a female slave are not treated as mere accessories to her. (See Tit. 1. 37.) Had they been so, they could not have passed without the principal to which they were attached.

Fundus instructus is land, with everything on it, whether for use or ornament; *fundus cum instrumento*, land, with the instruments of its culture only. (D. xxxiii. 7. 12. 27.)

18. Si grex legatus fuerit posteaque ad unam ovem pervenerit, quod superfuerit, vindicari potest.

18. If a flock is given as a legacy, and it is afterwards reduced to a single sheep, the legatee can claim by real action what remains.

D. xxx. 22.

He may claim the remainder, that is the one sheep left, although one sheep does not form a flock.

19. Grege autem legato etiam eas oves, quæ post testamentum factum gregi adiciuntur, legato cedere, Julianus ait: esse enim gregis unum corpus ex distantibus capitibus, sicuti ædium unum corpus est ex cohærentibus lapidibus: ædibus denique legatis, columnas et marmora, quæ post testamentum factum adjecta sunt, legato cedere.

19. If a flock is given as a legacy, any sheep that may be added to the flock after the making of the testament will, according to Julian, pass to the legatee. For a flock is one body, consisting of several different heads, as a house is one body, composed of several stones joined together. So, when a building is given as a legacy, any marble or pillars which may be added after the testament is made will pass by the legacy.

D. xxx. 21.

20. Si peculium legatum fuerit, sine dubio quidquid peculio accedit vel decedit vivo testatore, legatarii lucro vel damno est. Quodsi post mortem testatoris ante aditam hereditatem servus adquisierit, Julianus ait, si quidem ipsi manumisso peculium legatum fuerit, omne, quod ante aditam hereditatem adquisitum est, legatario cedere, quia dies hujus legati ab adita hereditate cedit: sed si extraneo peculium legatum fuerit, non cedere ea legata, nisi ex rebus peculiaribus auctum fuerit. Peculium autem nisi legatum fuerit, manumisso non debetur, quamvis si vivus manumiserit, sufficit, si non adimatur: et ita divi Severus et Antoninus rescripserunt. Iidem rescripserunt, peculio legato, non videri id relictum, ut petitionem habeat pecuniæ, quam in rationes dominicas impendit. Iidem rescripserunt, peculium videri legatum, cum rationibus redditis liber esse jussus est et ex eo reliquas inferre.

20. If a *peculium* is given in a legacy, it is certain that if it is increased or diminished in the lifetime of the testator, it is so much gained or lost to the legatee. And if a slave acquires anything between the death of the testator and the time of the heir entering on the inheritance, Julian makes this distinction: if it is to the slave himself that the *peculium*, together with his enfranchisement, is given, then all that is acquired before the heir enters on the inheritance goes to the legatee, for the right to such a legacy is not fixed until the inheritance is entered on. But if it is to a stranger that the *peculium* is given, then anything so acquired will not pass to the legatee, unless the acquisition was made by means of something forming part of the *peculium*. His *peculium* does not go to a slave manumitted by testament, unless expressly given to him; although, if a master in his lifetime manumits his slave, it is enough if he does not expressly take the *peculium* away from him; and to this effect the Emperors Severus and Antoninus issued a rescript. They have also decided by rescript, that when his *peculium* is given as a legacy to a slave, this does not entitle him to demand what he may have expended for the use of his master. The same emperors have further decided by rescript, that a slave is to be considered to have had his *peculium* given him by legacy when the testator says he shall be free as soon as he has brought in his accounts, and made up any deficiency out of his *peculium*.

D. xxxiii. 8. 8. 8; D. xxxiii. 8. 6. 4, 5; D. xxxiii. 8. 8. 7; D. xv. 1. 53.

Dies cedit, 'the day begins,' and *dies venit*, 'the day is come,' are the two expressions in Roman law which signify the vesting or

fixing of an interest, and the interest becoming a present one. *Cedere diem* (says Ulpian, D. l. 16. 213) *significat incipere deberi pecuniam; venire diem significat eum diem venisse, quo pecunia peti potest. Cedit dies* may therefore be translated, 'the time when the right to the thing is fixed'; *venit dies*, 'the time when the thing may be demanded'. For instance, if A buys a horse of B, without any terms being attached to the purchase, the right of B in the purchase-money is fixed at once, and also he may at once demand it, *et cessit et venit dies*. If A agrees that the purchase-money shall be paid by instalments, then *dies cessit*, B has a fixed interest in the money; but the *dies* can only be said *venisse* as each instalment falls due, and with regard only to the portion becoming due. If, again, A only buys it on condition that C will lend him the money, then, until C has done so, *neque cessit neque venit dies*, B has no fixed interest in, or right to, the purchase-money until the condition is accomplished. With regard to legacies, the *dies cedens*, the time at which the eventual rights of the legatee were fixed, was the day of the testator's death, excepting when the vesting or fixing of these rights was suspended by a condition in the testament itself. The *dies veniens*, the time when the thing given could be demanded, was not till the heir entered on the inheritance, and there was thus some one of whom to make the demand; if the legacy was given after a term, or on a condition, the demand, of course, could not be made (*dies non venit*) until the term had expired, or the condition was fulfilled.

An alteration was made by the *lex Papia Poppæa* (A.D. 9) in fixing the *dies cedens* at the day when the testament was opened, not at that when the testator died (see note to paragr. 8); but this had been done away with, and the old law was in force under Justinian. (C. vi. 51. 1. 1.)

The legatee had the thing given exactly as it was at the time of the *dies cedens*. He took it with all the gains and losses that had accrued to it since the date of the testator's death, and directly his rights were fixed, they were transmissible to his heirs.

But if a testator gave his liberty to one of his slaves as a legacy, there was in this case an exception to the rule that the *dies cedens* dates from the death of the testator. If the gift of liberty was given to a slave as a legacy, he could not begin to acquire for his own benefit until an heir had entered on the inheritance, as it was requisite there should be some one to free him. The *peculium*, therefore, if given to him, would be such as it was when the heir entered on the inheritance; while, if the *peculium* was given to a stranger, it would be such as it was at the death of the testator, excepting when the *peculium* was augmented by things derived from itself (*ex rebus peculiaribus*), as, for instance, if sheep or cattle, forming part of the *peculium*, had young.

There was another case, that of personal servitudes, in which the *dies cedens* dated from the entrance on the inheritance, not from the death of the testator. These servitudes were exclusively attached

to the person of the legatee, and as they were not transmissible to his heirs, there could be no interest in them until the actual enjoyment of them was commenced.

When the master enfranchised his slave himself, he was present to demand the *peculium*, and if he did not, it was considered evident that he intended the slave to keep it. Not so in a legacy of liberty, in giving which the master might so easily forget the *peculium* that some expressions were required to show that he remembered it, and wished to give it to the slave.

The terms of the second rescript referred to in the text are given by Ulpian. (D. xxxiii. 8. 6. 4.)

21. Tam autem corporales res quam incorporales legari possunt. Et ideo quod defuncto debetur, potest alicui legari, ut actiones suas heres legatario præstet, nisi exegerit vivus testator pecuniam: nam hoc casu legatum extinguitur. Sed et tale legatum valet: 'damnas esto heres domum illius reficere' vel 'illum ære alieno liberare'.

21. Things corporeal and incorporeal may be equally well given as a legacy. Thus, the testator may give a debt due to him, and the heir is then obliged to use his actions for the benefit of the legatee, unless the testator in his lifetime exacted payment, for in this case the legacy would become extinct. Such a legacy as this is also good: 'Let my heir be bound to rebuild the house of such a one,' or 'to free him from his debts'.

D. xxx. 41. pr.; D. xxx. 39. 3, 4.

The legacy of a debt due to the testator was usually called *legatum nominis*. (See D. xxx. 44. 6.) Of course the legatee could sue for it only in the name of the heir.

22. Si generaliter servus vel alia res legetur, electio legatarii est, nisi aliud testator dixerit.

22. If a testator gives a slave or anything else as a legacy, without specifying a particular slave or thing, the choice belongs to the legatee, unless the testator has expressed the contrary.

D. xxx. 108. 2.

The jurists took care to lay down, with respect to what was called a *legatum generis*, that the class of objects must not be one too wide. *Legatum nisi certæ rei sit et ad certam personam deferatur, nullius est momenti.* (PAUL. *Sent.* iii. 6. 13.) For instance, the gift of 'an animal' would have seemed rather intended to mock than to benefit the legatee; so the gift of a house if the testator had no houses, *magis derisorium quam utile legatum.* (D. xxx. 71.)

Before Justinian, it depended on the formula with which the legacy was given whether the choice of the particular thing to be given to the legatee belonged to the heir or the legatee. In a legacy *per vindicationem* it belonged to the latter; there was a real action in which the legatee must specify the particular thing that he claims. In a legacy *per damnationem* it belonged to the heir; there was only a personal action against the heir as debtor, and the debtor might discharge the obligation in the way most beneficial to himself. (ULP. *Reg.* 24. 14.)

The main difference between a *legatum generis* and a *legatum optionis* was that in the latter the legatee could choose the best of the kind in the possession of the testator; in the former the legatee could not choose the best, nor the heir the worst. (D. xxx. 37.)

23. Optionis legatum, id est ubi testator ex servis suis vel aliis rebus optare legatarium jusserat, habebat in se condicionem, et ideo nisi ipse legatarius vivus optaverat, ad heredem legatum non transmittebat. Sed ex constitutione nostra et hoc in meliorem statum reformatum est et data est licentia et heredi legatarii optare, licet vivus legatarius hoc non fecit. Et diligentiore tractatu habito, et hoc in nostra constitutione additum est, sive plures legatarii existant, quibus optio relicta est, et dissentiant in corpore eligendo, sive unius legatarii plures heredes, et inter se circa optandum dissentiant, alio aliud corpus eligere cupiente, ne pereat legatum (quod plerique prudentium contra benevolentiam introducebant), fortunam esse hujus optionis judicem et sorte esse hoc dirimendum, ut, ad quem sors perveniat, illius sententia in optione præcellat.

23. The legacy of election, that is when a testator directs his legatee to choose any one from among his slaves, or any other class of things, was formerly held to imply a condition, so that if the legatee in his lifetime did not make the election he did not transmit the legacy to his heir. But, by our constitution, we have altered this for the better, and the heir of the legatee is now permitted to elect, although the legatee in his lifetime has not done so. And, pursuing the subject still further, we have added, that if there are several legatees to whom an option is left, and they differ in their choice, or if there are many heirs of one legatee, and they cannot agree what to choose, one choosing one thing and another another thing, then to prevent the legacy becoming ineffectual, which the generality of ancient lawyers, contrary to all equity, decided would be the case, fortune must be the arbitress of the choice, and the dispute must be decided by lot, so that his choice, to whom the lot falls, shall prevail.

D. xl. 9. 3; D. xxxvi. 2. 12. 8; C. vi. 43. 3. pr. and 1.

When once the *dies cedens* had fixed the rights of the legatee, he could transmit to his heirs all the rights he had himself. To this the Roman lawyers considered the *legatum optionis* an exception, as intended to be personal to the legatee himself. Justinian decides that the exception shall not exist. (C. vi. 43. 3. 1.) We must distinguish the *legatum generis*, where an object, though an uncertain one, was given, from the *legatum optionis*, where only the right to select an object was given. The former was never treated as an exception to the general rule of the *dies cedens*. (D. xxxiii. 5. 19.)

A testator might also leave as a legacy a part, as e.g. the half, of the inheritance (Tit. 23. 5 note); but still the heir took the whole inheritance as heir, and then had to divide it with the *legatarius partiarius*, although the legatee was really not getting a particular thing, but a share of a universal succession. (Gai. ii. 254.)

24. Legari autem illis solis potest, cum quibus testamenti factio est.

24. A legacy can be given to those only, with whom there is *testamenti factio*.

D. xli. 8. 7.

See note on Tit. 10. 6.

25. Incertis vero personis neque legata neque fideicommissa olim relinqui concessum erat: nam nec miles quidem incertæ personæ poterat relinquere, ut divus Hadrianus rescripsit. Incerta autem persona videbatur, quam incerta opinione animo suo testator subiciebat, veluti si quis ita dicat: 'quicumque filio meo in matriomonium filiam suam collocaverit, ei heres meus illum fundum dato': illud quoque, quod his relinquebatur, qui post testamentum scriptum primi consules designati erunt, æque incertæ personæ legari videbatur: et denique multæ aliæ hujusmodi species sunt. Libertas quoque non videbatur posse incertæ personæ dari, quia placebat nominatim servos liberari. Tutor quoque certus dari debebat. Sub certa vero demonstratione, id est ex certis personis incertæ personæ recte legabatur, veluti 'ex cognatis meis, qui nunc sunt, si quis filiam meam uxorem duxerit, ei heres meus illam rem dato'. Incertis autem personis legata vel fideicommissa relicta et per errorem soluta repeti non posse, sacris constitutionibus cautum erat.

25. Formerly it was not permitted that either legacies or *fideicommissa* should be given to uncertain persons, and even a soldier could not leave anything to an uncertain person, as the Emperor Hadrian decided by rescript. By an uncertain person was meant one who was not present to the mind of the testator in any definite manner, as if he should say: 'Whoever shall give his daughter in marriage to my son, to him let my heir give such a piece of land'. So, if he had left anything to the persons first appointed consuls after his testament was written, this also would have been a gift to uncertain persons; and there are many other similar examples. Freedom likewise could not be conferred upon an uncertain person, for it was necessary that all slaves should be enfranchised by name. A person too named as tutor was required to be certain. But a legacy given with a certain description, that is, to an uncertain person among a number of persons certain, was valid, as: 'Among my existing *cognati*, if any one shall marry my daughter, let my heir give him such a thing'. But, if a legacy or *fideicommissum* to uncertain persons had been paid by mistake, it was provided by the constitutions, that such persons could not be called on to refund.

GAI. ii. 238, 239.

Neque fideicommissa. It was by a *senatusconsultum*, in the time of Hadrian, that the law was thus settled with respect to *fideicommissa.* (GAI. ii. 287.) Previously, a gift by way of *fideicommissum* to an uncertain person had been valid.

The *lex Furia Caninia* (GAI. ii. 239) required that slaves to whom freedom was given by testament should be expressly named, *jubet nominatim servos liberari.*

26. Postumo quoque alieno inutiliter legabatur: est autem alienus postumus, qui natus inter suos heredes testatoris futurus non est: ideoque ex emancipato filio conceptus nepos extraneus erat postumus avo.

26. Formerly, too, a legacy to a posthumous stranger was ineffectual. A posthumous stranger is any one who, on being born, would not be numbered among the *sui heredes* of the testator; and so a posthumous grandson, the issue of an emancipated son, was a posthumous stranger with regard to his grandfather.

GAI. ii. 241.

We have already seen (see Tit. 13. 1) how the rigour of this principle came to be modified with respect to a posthumous *suus heres*. It was as an *incerta persona* that the posthumous child was originally excluded from taking either as heir or legatee. (GAI. ii. 242.)

27. Sed nec hujusmodi species penitus est sine justa emendatione derelicta, cum in nostro codice constitutio posita est, per quam et huic parti medevimus non solum in hereditatibus, sed etiam in legatis et fideicommissis: quod evidenter ex ipsius constitutionis lectione clarescit. Tutor autem nec per nostram constitutionem incertus dari debet, quia certo judicio debet quis pro tutela suæ posteritati cavere.

27. These points have not, however, been left without proper alteration, for a constitution has been placed in our code by which the law has been altered, not only as regards inheritances, but also as regards legacies and *fideicommissa*. This alteration will appear from the constitution itself. But not even by our constitution is the nomination of an uncertain tutor permitted, for it is incumbent upon every father to take care that his posterity have a tutor by a determinate appointment.

C. vi. 48.

There was, probably, a constitution treating of this subject inserted in the first Code (see Introd. sec. 29), which was not given in the Code we now have.

28. Postumus autem alienus heres institui et antea poterat et nunc potest, nisi in utero ejus sit, quæ jure nostra uxor esse non potest.

28. Yet a posthumous stranger could formerly, and may now, be appointed heir, unless it appears that he has been conceived by a woman who by law could not have been married to his father.

GAI. ii. 242, 287; D. xxviii. 2. 9. 1, 4.

Posthumous children, who, on birth, would not be among the testator's *sui heredes* (this is the meaning of *alienus*), could not be instituted heirs under the civil law; but the prætor gave them, if instituted, the *possessio bonorum*. Justinian permitted their institution. (See Bk. iii. Tit. 9. pr.)

Nisi in utero ejus sit, that is, unless the posthumous child is the child of the testator, and of a woman whom the testator cannot marry.

29. Si quis in nomine, cognomine, prænomine legatarii erraverit testator, si de persona constat, nihilo minus valet legatum. Idem in heredibus servatur: et recte; nomina enim significandorum hominum gratia reperta sunt, qui si quolibet alio modo intellegantur, nihil interest.

29. Although a testator may have mistaken the *nomen*, *cognomen*, or *prænomen* of a legatee, yet, if it is certain who is the person meant, the legacy is valid. The same holds good as to heirs, and with reason; for the use of names is but to point out persons; and, if they can be distinguished by any other method, it is the same thing.

30. Huic proxima est illa juris regula, falsa demonstratione legatum non peremi, veluti si quis ita

30. Closely akin to this is the rule of law, that a legacy is not rendered void by a false description. For in-

legaverit 'Stichum servum meum vernam do lego': licet enim non verna, sed emptus sit, si de servo tamen constat, utile est legatum. Et convenienter si ita demonstraverit 'Stichum servum, quem a Seio emi,' sitque ab alio emptus, utile legatum est, si de servo constat.

stance, if the testator was to say, 'I give as a legacy Stichus born my slave'; in this case, although Stichus was not born in the family, but bought, yet, if it is certain who is meant, the legacy is valid. And in the same way if a testator marks out the particular slave in this way: 'I give Stichus my slave, whom I bought of Seius'; yet, although he was bought of another, the legacy is good, if no doubt exists as to the slave intended to be given.

D. xxxv. 1. 17. pr. and 1.

31. Longe magis legato falsa causa non nocet. Veluti cum ita quis dixerit: 'Titio, quia absente me negotia mea curavit, Stichum do lego,' vel ita: 'Titio, quia patrocinio ejus capitali crimine liberatus sum, Stichum do lego': licet enim neque negotia testatoris umquam gessit Titius neque patrocinio ejus liberatus est, legatum tamen valet. Sed si condicionaliter enuntiata fuerit causa, aliud juris est, veluti hoc modo: 'Titio, si negotia mea curavit, fundum do lego'.

31. Much less is a legacy rendered invalid by a false reason being assigned for giving it; as, if a testator says, 'I give my slave Stichus to Titius, because he took care of my affairs in my absence'; or, 'because I was acquitted upon a capital accusation by his undertaking my defence'. For although Titius has never taken care of the affairs of the deceased, and although the testator was never acquitted by means of Titius defending him, the legacy will be valid. But it is quite different if the reason has been assigned under the form of a condition, as, 'I give to Titius such a piece of ground, if he has taken care of my affairs'.

D. xxxv. 1. 17. 2, 3.

Ulpian shortly sums up the law of this and the previous paragraph by the rule '*Neque ex falsa demonstratione, neque ex falsa causa legatum infirmatur*'. (Ulp. *Reg.* 24. 19.)

Of course if the reason for making the legacy was so given as to constitute a condition, the legacy was only valid if the condition had been accomplished.

32. An servo heredis recte legamus, quæritur. Et constat, pure inutiliter legari nec quidquam proficere, si vivo testatore de potestate heredis exierit, quia quod inutile foret legatum, si statim post factum testamentum decessisset testator, hoc non debet ideo valere, quia diutius testator vixerit. Sub condicione vero recte legatur, ut requiramus, an, quo tempore dies legati cedit, in potestate heredis non sit.

32. The question has been raised whether a testator can give a legacy to the slave of his heir; and it is evident that such a legacy, if given absolutely, is quite ineffectual, nor is it at all helped by the slave having been freed from the power of the heir in the lifetime of the testator; for a legacy which would have been void if the testator had expired immediately after he had made the testament, ought not to become valid merely because he happened to live longer. But a testator may give the legacy to the slave under a condition, and then we have to inquire whether, at the time when the right to the legacy vests, the slave has ceased to be in the power of the heir.

Gai. ii. 244; D. xxxiv 7. 1.

This paragraph is based on the *regula Catoniana* (see note on paragraph 10), though no express allusion to it is made. As to the doubts entertained on the subject, see GAI. ii. 244.

33. Ex diverso herede instituto servo, quin domino recte etiam sine condicione legetur, non dubitatur. Nam et si statim post factum testamentum decesserit testator, non tamen apud eum, qui heres sit, dies legati cedere intellegitur, cum hereditas a legato separata sit et possit per eum servum alius heres effici, si prius, quam jussu domini adeat, in alterius potestatem translatus sit, vel manumissus ipse heres efficitur; quibus casibus utile est legatum: quodsi in eadem causa permanserit et jussu legatarii adierit, evanescit legatum.

33. On the other hand, it is not doubted, but that if a slave is appointed heir, a legacy may be given to his master even unconditionally; for, although the testator should die immediately after making the testament, still the right to the legacy is not taken to vest in him who is heir; for the inheritance is separated from the legacy, and another may become heir by means of the slave, if he should be transferred to the power of a new master, before he has entered upon the inheritance at the command of the master, who is the legatee; or the slave himself, if enfranchised, may become heir; and, in these cases, the legacy would be good. But, if the slave should remain in the same state, and enter upon the inheritance by order of the legatee, the legacy is at an end.

GAI. ii. 245.

The eventual right to the legacy vests in the legatee from the date of the testator's death, but the right to claim the legacy does not accrue to the legatee until the heir has entered on the inheritance. It is the legatee, not the heir, in whom the eventual right vests. Now, if the slave, in the case discussed in the text, entered on the inheritance by the command of his master, the legatee, the master, through the slave, would be heir and also legatee, and so the legacy would merge, or fade away (*evanescit*), in the inheritance. But until the inheritance is entered on, the legatee keeps his position of having a vested right in the legacy, and it may happen that the slave will not then hold such a character as will cause this merger of the legacy in the inheritance. He may have been emancipated, and will then take as heir for himself, or he may have been transferred to another master, and will take for his new owner.

34. Ante heredis institutionem inutiliter antea legabatur, scilicet quia testamenta vim ex institutione heredum accipiunt et ob id veluti caput atque fundamentum intellegitur totius testamenti heredis institutio. Pari ratione nec libertas ante heredis institutionem dari poterat. Sed quia incivile esse putavimus, ordinem quidem scripturæ sequi (quod et ipsi antiquitati vituperandum fuerat visum), sperni autem testatoris voluntatem; per nos-

34. Formerly, a legacy placed before the institution of the heir was ineffectual, because a testament receives its efficacy from the institution of the heir; and it is thus that the institution of the heir is looked on as the head and the foundation of the whole testament. So, too, freedom could not be given before the institution of the heir. But we have thought it unreasonable that the mere order of writing should be attended to—a thing of which the ancients themselves seem to have

tram constitutionem et hoc vitium emandavimus, ut liceat et ante heredis institutionem et inter medias heredum institutiones legatum relinquere et multo magis libertatem, cujus usus favorabilior est.

greatly disapproved—and that the intentions of the testator should be thus set at naught. We have, therefore, by our constitution, amended the law on this point; so that a legacy, and much more a grant of liberty, which is always favoured, may now be given before the institution of an heir, or among the institutions of heirs where more than one.

GAI. ii. 229, 230; C. vi. 23, 24.

The nomination of a tutor, as not constituting any burden on the inheritance, had already been considered by the Proculians to be an exception to the rule, that nothing in a testament could be valid that preceded the institution of the heir. (GAI. ii. 231.)

35. Post mortem quoque heredis aut legatarii simili modo inutiliter legabatur: veluti si quis ita dicat: 'Cum heres meus mortuus erit, do lego': item 'pridie quam heres aut legatarius morietur'. Sed simili modo et hoc correximus, firmitatem hujusmodi legatis ad fideicommissorum similitudinem præstantes, ne vel in hoc casu deterior causa legatorum quam fideicommissorum inveniatur.

35. So, too, a legacy made to take effect after the death of an heir or legatee, was ineffectual; as, if a testator said, 'When my heir is dead, I give as a legacy,' or thus, 'I give as a legacy on the day preceding the day of the death of my heir, or of my legatee'. But we have corrected the ancient rule in this respect, by giving all such legacies the same validity as *fideicommissa;* so that, even in this case, the position of legacies may not be found inferior to that of *fideicommissa.*

GAI. ii. 232; C. iv. 11.

Gaius remarks, that the second of these forms, *Pridie quam,* though objected to because the time when the right was fixed could not be known until the heir was dead, was not objected to on any very good ground. For all that the principles of law forbad was, that the interest should not be fixed until after the death of the heir, for then it would have been the heir's heir, and not the heir, that was charged; and that it should not be fixed until after the death of the legatee, for if he had no vested interest in his life, he could have nothing to transmit. But a legacy made so as to give a fixed right the day before either of their deaths, was not open to the same objections.

36. Pœnæ quoque nomine inutiliter legabatur et adimebatur vel transferebatur. Pœnæ autem nomine legari videtur, quod coercendi heredis causa relinquitur, quo magis is aliquid faciat aut non faciat: veluti si quis ita scripserit: 'Heres meus si filiam suam in matrimonium Titio collocaverit' (vel ex diverso 'si non collocaverit'), 'dato decem aureos Seio,' aut si ita scripserit: 'Heres meus si servum Stichum alienaverit' (vel ex diverso 'si non

36. Also formerly, if a testator had given, revoked, or transferred a legacy by way of penalty, he would have done so ineffectually. A legacy is considered as given by way of a penalty, when it is intended to constrain an heir to do or not to do something; as, if a testator has said, 'If my heir gives his daughter in marriage to Titius,' or, 'if he does not give her in marriage to Titius, let him pay ten *aurei* to Seius'; or thus, 'If my heir shall alienate my slave Stichus,' or 'if my heir shall not

alienaverit'), 'Titio decem aureos dato'. Et in tantum hæc regula observabatur, ut perquam pluribus principalibus constitutionibus significetur, nec principem quidem agnoscere, quod ei pœnæ nomine legatum sit. Nec ex militis quidem testamento talia legata valebant, quamvis alias militum voluntates in ordinandis testamentis valde observantur. Quin etiam nec libertatem pœnæ nomine dari posse placebat. Eo amplius nec heredem pœnæ nomine adici posse Sabinus existimabat, veluti si quis ita dicat: 'Titius heres esto: si Titius filiam suam Seio in matrimonium collocaverit, Seius quoque heres esto': nihil enim interérat, qua ratione Titius coerceatur, utrum legati datione an coheredis adjectione. At hujusmodi scrupulositas nobis non placuit et generaliter ea, quæ relinquuntur, licet pœnæ nomine fuerint relicta vel adempta vel in alios translata, nihil distare a ceteris legatis constituimus vel in dando vel in adimendo vel in transferendo: exceptis his videlicet, quæ impossibilia sunt vel legibus interdicta aut alias probrosa: hujusmodi enim testatorum dispositiones valere, secta temporum meorum non patitur.

alienate my slave Stichus, let him pay ten *aurei* to Titius'. And this rule was so rigorously observed, that it was expressly ordained by many constitutions, that even the emperor would not accept a legacy which was given by way of a penalty. Nor could such a legacy be valid, even when given by the testament of a soldier; although, in other respects, the intention of a testator in a military testament was scrupulously adhered to. And even freedom could not be given by way of a penalty. Still less, in the opinion of Sabinus, could another heir be added; as if, for instance, a testator said, 'Let Titius be my heir, but if he gives his daughter in marriage to Seius, let Seius also be my heir'. For it made no difference how Titius was put under constraint, whether by the gift of a legacy, or the addition of a co-heir. But this kind of tendency to create difficulties has not pleased us, and we have therefore ordained generally that things left, revoked, or transferred by way of penalty, shall be treated as other legacies, with the exception of anything that may be impossible, prohibited by law, or contrary to morality. For the principles of our age will not permit testamentary dispositions of such a character.

GAI. ii. 235, 236, 243; C. vi. 41.

It is rather difficult to say how this rule sprang up in Roman law, or how the gift of a legacy *pœnæ nomine* differed from an ordinary condition. Theophilus, in his Paraphrase, gives as one reason that a legacy ought to spring from a feeling of kindness to the legatee, and not be used as a means to punish another. For want of a better reason, we may be content with this.

The sections of this Title may be arranged under five heads. The first treats of the definition and general notions of a legacy (paragr. 1, 2, 3, 8); the second treats of the objects given as legacies (paragr. 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 21, 22, and 23); the third treats of the persons to whom legacies can be given (paragr. 24, 25, 26, 27, 28, 32, and 33); the fourth of rules as to the position, terms, and construction of legacies (paragr. 29, 30, 31, 34, 35, and 36); and the fifth, of the loss, diminution, or increase of things given as legacies (paragr. 16, 17, 18, 19, 20).

TIT. XXI. DE ADEMPTIONE LEGATORUM.

Ademptio legatorum, sive eodem testamento adimantur sive codicillis,

The revocation of a legacy, whether made in the same testament or in a

firma est, sive contrariis verbis fiat ademptio, veluti si, quod ita quis legaverit 'do lego,' ita adimatur 'non do non lego,' sive non contrariis, id est aliis quibuscumque verbis.

codicil, is valid, and may be made in terms contrary to those of the gift, as when a testator gives in these terms, 'I give as a legacy,' and revokes it by saying, 'I do not give as a legacy'; or in terms not contrary, that is, in any other form of expression.

D. xxxiv. 4. 3. 11.

It was considered necessary, in the times when weight was attached to the formula under which the legacy was given, that the legacy should be revoked by words exactly opposite (*contrariis verbis*) to those by which it was given, as in a legacy *per vindicationem* the revocation ought to have been by the words '*non do non lego*'. (ULP. *Reg.* 24. 29.)

The text only speaks of direct revocation of legacies by an express declaration of the testator's wishes in some testamentary document; but it was also revoked by the mere wish of the testator (*nuda voluntate*, D. xxxiv. 4. 3. 11) that it should be revoked being in any way declared. In such a case the legacy was not, strictly speaking, taken away; but the legatee who brought an action for it might be repelled by an exception of *dolus malus*. We have seen, in the last Title (paragr. 12), that a sale of the thing given as a legacy was held to be or not to be a revocation of the legacy, according as the testator intended or did not intend that such should be its effect.

A legacy was also considered to be revoked by implication if something occurred after it was given which made it impossible to believe that the testator could have continued to wish the legatee to profit by his bounty; as, for instance, if a notorious and deadly enmity sprang up between them. (D. xxxiv. 4. 3. 11.)

1. Transferri quoque legatum ab alio ad alium potest, veluti si quis ita dixerit: 'hominem Stichum, quem Titio legavi, Seio do lego,' sive in eodem testamento sive in codicillis hoc fecerit: quo casu simul Titio adimi videtur et Seio dari.

1. A legacy may also be transferred from one person to another; as, 'I give as a legacy to Seius my slave Stichus, whom I have given as a legacy to Titius,' whether this be done in the same testament or in codicils; and in this case it seems that at the same time a legacy is taken from Titius and given to Seius.

D. xxxiv. 4, 5.

The translation had two effects: it took away a legacy from one person and gave it to another; but it might have either effect without the other. The original legatee might be dead, and thus the legacy useless, and yet the gift to the new legatee would be valid; or the new legatee might subsequently die, or he might not have *testamenti factio* with the testator, and yet the legacy would be lost to the original legatee. (D. xxxiv. 4. 20.)

TIT. XXII. DE LEGE FALCIDIA.

Superest, ut de lege Falcidia dispiciamus, qua modus novissime legatis impositus est. Cum enim olim lege duodecim tabularum libera erat legandi potestas, ut liceret vel totum patrimonium legatis erogare (quippe ea lege ita cautum esset: 'uti legasset suæ rei ita jus esto'): visum est hanc legandi licentiam coartare, idque ipsorum testatorum gratia provisum est ob id, quod plerumque intestati moriebantur, recusantibus scriptis heredibus pro nullo aut minimo lucro hereditates adire. Et cum super hoc tam lex Furia quam lex Voconia latæ sunt, quarum neutra sufficiens ad rei consummationem videbatur: novissime lata est lex Falcidia, qua cavetur, ne plus legare liceat, quam dodrantem totorum bonorum, id est ut, sive unus heres institutus esset sive plures, apud eum eosve pars quarta remaneret.

It remains to speak of the *lex Falcidia*, by which legacies have received their latest limitations. By the law of the Twelve Tables, a testator was permitted to dispose of his whole patrimony in legacies; for the law said, 'As a man has disposed of his property, so let the law be'; but it was thought proper to restrain this license even for the benefit of testators themselves, because they frequently died intestate, the heirs they instituted refusing to enter upon an inheritance from which they could receive little or no profit. With this object the *lex Furia* and the *lex Voconia* were passed; and lastly, as neither of these was found adequate to the purpose, the *lex Falcidia* was enacted, which forbids a testator to give more in legacies than three-fourths of all his property; so that, whether there be one or more heirs instituted, there must remain to him, or them, at least one-fourth part of the whole.

GAI. ii. 224-227.

The *lex Furia testamentaria* (B.C. 182), which must not be confounded with the *lex Furia* or *Fusia Caninia*, restraining the testamentary manumission of slaves (Bk. i. Tit. 7), was a *plebiscitum*, probably of the year B.C. 183. Gaius thus acquaints us with its provisions :—'*Qua, exceptis personis quibusdam* (see ULP. *Reg.* xxviii. 7), *ceteris plus mille assibus legatorum nomine mortisve causa capere permissum non est'*: more than 1000 asses could not be given as a legacy. The law failed to effect its object, as the testator was not restrained in the number of legacies he might give, but only in the amount of each legacy. (GAI. ii. 225.)

The *lex Voconia*, also called *testamentaria*, was a *plebiscitum*, of which the year B.C. 169 is given as the date. Gaius says of it, '*Qua cautum est, ne cui plus legatorum nomine mortisve causa capere liceret, quam heredes caperent'*: no legatee was to have more than each heir had. This law also failed in its object; as, by multiplying the number of legatees and giving each a trifling amount, the sum received by the heirs, which would be equally small, might be too trifling to make it worth their while to enter on the inheritance. (GAI. ii. 226.)

The *lex Falcidia* (see note on Tit. 18. 3) was a *plebiscitum* passed in the year B.C. 40. Its principles were extended to *fideicommissa* by the *senatusconsultum Pegasianum* (see next Title, paragr. 5); to *fideicommissa* imposed on *heredes ab intestato* by a rescript of Antoninus Pius (D. xxxv. 2. 18); to donations *mortis*

causa by a rescript of Severus and Antoninus (C. vi. 50. 5); and lastly, to donations between husband and wife (C. vi. 50. 12). The mode in which the heir would avail himself of the *lex Falcidia* would be by repelling, by an exception, the legatee who demanded the whole of his legacy, when less than the whole was due by the *lex Falcidia*.

The part reserved to the heir is spoken of by the jurists as *quarta* or *Falcidia*. The commentators more usually employ the full term *quarta Falcidia*.

1. Et cum quæsitum esset, duobus heredibus institutis, veluti Titio et Seio, si Titii pars aut tota exhausta sit legatis, quæ nominatim ab eo data sunt, aut supra modum onerata, a Seio vero aut nulla relicta sint legata, aut quæ partem ejus dumtaxat in partem dimidiam minuunt, an, quia is quartam partem totius hereditatis aut amplius habet, Titio nihil ex legatis, quæ ab eo relicta sunt, retinere liceret: placuit, ut quartam partem suæ partis salvam habeat, posse retinere: etenim in singulis heredibus ratio legis Falcidiæ ponenda est.

1. When two heirs are instituted, as Titius and Seius, a question has been raised: supposing the share of Titius in the inheritance is either entirely absorbed, or very heavily burdened with legacies specifically charged upon it, while the share of Seius is wholly free, or has legacies charged on it only up to half its amount, in such a case does the circumstance of Seius having a clear fourth or more of the inheritance prevent Titius from retaining, out of the legacies charged upon his share, enough to secure a fourth part of his own moiety to himself? It has been decided that Titius may retain the fourth of his own share, for the calculation of the *lex Falcidia* is applicable to each heir separately.

D. xxxv. 2. 77.

The testator is here supposed to give a distinct share of his inheritance to two different persons, and to burden one share with legacies while leaving the other free. The heir whose share is burdened is entitled to have a clear fourth of his share, although the legatees would be getting less in the whole than three-fourths of the inheritance. The reason was probably this:—Under the old civil law, if one heir refused to enter, his share accrued to the coheir who did enter free of all burdens (*sine onere*). Unless, therefore, the heir whose share was burdened had been induced by the right of retaining the Falcidian fourth to enter, he would have refused to enter, and his share would have accrued *sine onere* to the co-heir, and the legatees would have got nothing. Under the *leges caducariæ* the accrual took place *cum onere;* but even then, although, if the free share accrued to the owner of the burdened share, the two were taken as one for the benefit of the legatees, and the heir who took both could take nothing more than a fourth of the two conjoined, if the legacies were sufficient to exhaust the remainder, yet, if the burdened share accrued to the owner of the free share, he kept his free share unimpaired, and was allowed to keep a clear fourth of the burdened share. (D. xxxv. 2. 78.)

2. Quantitas autem patrimonii, ad quam ratio legis Falcidiæ red-

2. In order to apply the *lex Falcidia*, regard is had to the value of

igitur, mortis tempore spectatur. Itaque si verbi gratia is, qui centum aureorum patrimonium habebat, centum aureos legaverit, nihil legatariis prodest, si ante aditam hereditatem per servos hereditarios aut ex partu ancillarum hereditariarum aut ex fetu pecorum tantum accesserit hereditati, ut, centum aureis legatorum nomine erogatis, heres quartam partem hereditatis habiturus sit, sed necesse est, ut nihilo minus quarta pars legatis detrahatur. Ex diverso si septuaginta quinque legaverit et ante aditam hereditatem in tantum decreverint bona incendiis forte aut naufragiis aut morte servorum, ut non amplius quam septuaginta quinque aureorum substantia vel etiam minus relinquatur, solida legata debentur. Nec ea res damnosa est heredi, cui liberum est non adire hereditatem: quæ res efficit, ut necesse sit legatariis, ne destituto testamento nihil consequantur, cum herede in portione pacisci.

the estate at the time of the testator's death. Thus, for instance, if he, who is worth a hundred *aurei* at his decease, bequeaths the whole hundred in legacies, the legatees receive no advantage, if the inheritance, before it is entered upon, should so increase by the labour of its slaves, the birth of children to female slaves, or the produce of cattle, that, after a full payment of the one hundred *aurei* in legacies, a clear fourth of the whole estate would remain to the heir, for the legacies notwithstanding would still be liable to a deduction of one-fourth. Conversely, if the testator has given only seventy-five *aurei* in legacies, then although, before the entrance of the heir, the estate should so decrease by fire, shipwreck, or the loss of slaves, that its whole value should not be more than seventy-five *aurei* or less, yet the legacies would still be due without deduction. Nor is this prejudicial to the heir, who is at liberty to refuse to enter on the inheritance, but it obliges the legatees to come to terms with the heir, so as to let him get a part, lest, if the testament is abandoned, they may lose the whole.

D. xxxv. 2. 73. pr.

The calculation under the *lex Falcidia* (B.C. 40) was made at the time of the testator's death, in accordance with the rule by which the *dies cedens* for most legacies was fixed at that time. It was, moreover, made then, even if the *dies cedens* was fixed at some other time. Between the death of the testator and the time of the heir entering on the inheritance, the estate might be so deteriorated as to make it disadvantageous to the heir to enter; and in order to persuade him to do so, the legatees would have to enter into a compromise with him.

3. Cum autem ratio legis Falcidiæ ponitur, ante deducitur æs alienum, item funeris impensa et pretia servorum manumissorum, tunc deinde in reliquo ita ratio habetur, ut ex eo quarta pars apud heredes remaneat, tres vero partes inter legatarios distribuantur, pro rata scilicet portione ejus, quod cuique eorum legatum fuerit. Itaque si fingamus, quadringentos aureos legatos esse et patrimonii quantitatem, ex qua legata erogari oportet, quadringentorum esse, quarta pars singulis legatariis detrahi debet.

3. When the calculation of the *lex Falcidia* is made, the testator's debts, his funeral expenses, and the price of the manumission of slaves, are deducted, then what remains is divided, so that a fourth part remains for the heir, and the other three parts are divided among the legatees in proportion to the amount of their respective legacies: for example, let us suppose that four hundred *aurei* have been given in legacies, and the estate out of which the legacies are to be paid is worth no more, each legatee must have a fourth part sub-

Quodsi trecentos quinquaginta legatos fingamus, octava debet detrahi. Quodsi quingentos legaverit, initio quinta, deinde quarta detrahi debet: ante enim detrahendum est, quod extra bonorum quantitatem est, deinde quod ex bonis apud heredem remanere oportet.

tracted from his legacy; but, if we suppose that the testator gave in legacies three hundred and fifty *aurei*, then an eighth ought to be deducted. And if he gave five hundred *aurei* in legacies, first a fifth must be deducted, and then a fourth. For that which exceeds the real value of the goods of the deceased must first be deducted, and then that which is to remain to the heir.

D. xxxv. 2. 1. 19; D. xxxv. 2. 39; D. xxxv. 2. 73. 5.

Octava debet detrahi, i.e. one eighth of the whole, or fifty *aurei*, must be deducted from the whole sum given to the different legatees, the sum to be deducted from each share being in proportion to the relative amount of that share. Each share would be diminished by one-seventh.

The *lex Falcidia* did not apply to military testaments. (D. xxxv. 2. 17.)

Under the new system regarding heirs invented by Justinian (see Tit. 19. 6) the heir entering with an inventory took the Falcidian fourth, unless the testator had expressly forbidden that he should take it; but the testator was now at liberty to deprive the heir of the Falcidian fourth, which previously he had not been. (Nov. 1. 2. 2.)

TIT. XXIII. DE FIDEICOMMISSARIIS HEREDITATIBUS.

Nunc transeamus ad fideicommissa. Et prius de hereditatibus fideicommissariis videamus.

Let us now pass to *fideicommissa;* and first we will treat of fideicommissary inheritances.

GAI. ii. 246, 247.

Fideicommissa, that is, trusts, might be compared to the institution of heirs, if the trust embraced the whole inheritance, and to the gift of legacies, if it embraced only a part. In the former case they were termed by the jurists *fideicommissariæ hereditates:* in the latter, *fideicommissa singularum rerum.* The text proceeds to speak of the *fideicommissariæ hereditates.*

The word *fideicommissum* has been generally retained in the translation, instead of trusts, because, as *fideicommissa* include only trusts carrying out the last wishes of a deceased person, the word trusts, which is used much more widely in its application, might lead to confusion.

Ulpian gives (*Reg.* 25. 1) the following definition of a *fideicommissum: 'Quod non civilibus verbis, sed precative relinquitur; nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis'.*

1. Sciendum itaque est, omnia fideicommissa primis temporibus in-

1. At first *fideicommissa* were of little force; for no one was com-

firma esse, quia nemo invitus cogebatur præstare id, de quo rogatus erat: quibus enim non poterant hereditates vel legata relinquere, si relinquebant, fidei committebant eorum, qui capere ex testamento poterant: et ideo fideicommissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum, qui rogabantur, continebantur. Postea primus divus Augustus semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam jussit consulibus auctoritatem suam interponere. Quod quia justum videbatur et populare erat, paulatim conversum est in adsiduam jurisdictionem: tantusque favor eorum factus est, ut paulatim etiam prætor proprius crearetur, qui fideicommissis jus diceret, quem fideicommissarium appellabant.

pelled against his will to perform what he was only requested to perform. When testators were desirous of giving an inheritance or legacy to persons, to whom they could not directly give either, they entrusted them to the good faith of some person capable of taking by testament; and *fideicommissa* were so called, because their performance could not be enforced by law, but depended solely upon the good faith of the person to whom they were entrusted. Afterwards, the Emperor Augustus, having been frequently moved by consideration for certain persons, or because the request was said to have been made in the name of the emperor's safety, or on account of some striking instance of perfidy, commanded the consuls to interpose their authority. Their intervention, being favoured as just by public opinion, gradually assumed the character of a regular jurisdiction, and trusts grew into such favour, that soon a special prætor was appointed to give judgment in these cases, and received the name of *prætor fideicommissarius*.

GAI. ii. 274, 275, 278, 285.

The freedom given by the introduction of obligatory trusts was singularly wide. A testator at the time of the introduction of *fideicommissa*, in order to give anything, was obliged to do so by a regular testament, to adopt prescribed formulæ, to use the Latin tongue. He could not give anything to a *peregrinus*, to a person proscribed, to a posthumous stranger, or to an uncertain person. The system of *fideicommissa* enabled him to give to almost any one he liked, and that in words the least formal, and even without a testament at all. (D. xxxii. 11. pr. and 21. pr.) The *heredes ab intestato*, if charged with a *fideicommissum* by the person to whose property they succeeded, were obliged to fulfil it (see par. 10). A man might give his whole inheritance by a *fideicommissum* to a woman whom he was prevented by the *lex Voconia* (B.C. 169) from instituting as heir (GAI. ii. 274); and *Latini Juniani* (see Bk. i. Tit. 5. 3) could take *fideicommissa*, though not inheritances or legacies. (GAI. ii. 275.) The license given to *fideicommissa* was, indeed, diminished by different enactments, and they were gradually placed more and more on the footing of legacies. Thus by one *senatusconsultum*, passed in the time of Hadrian, the power of giving a *fideicommissum* to a *peregrinus* (GAI. ii. 285), by another the power of giving one to a posthumous stranger or uncertain person, was taken away. (GAI. ii. 287.) Again, the *senatusconsultum Pegasianum* (A.D. 73) subjected *fideicommissa* to the rules of the *lex Papia Poppæa*

(GAI. ii. 286); and a testamentary tutor could never be appointed by a *fideicommissum*. (GAI. ii. 289.) *Fideicommissa* were, indeed, always something beside and foreign to the nature of Roman law. Augustus merely ordered that, in a case of great hardship, the consuls should interfere. Then a magistrate was created whose business it was to interfere in cases which wanted it; but there was nothing like an action at law to enforce *fideicommissa*. (ULP. *Reg.* 25. 12.) The *fideicommissarius* applied for aid as having equity on his side; and if the magistrate chose to interfere, the regular course of the law was stayed, and the trust enforced. The proceeding was always *extra ordinem* (GAI. ii. 278), and the jurisdiction was exercised throughout the year, while legacies could only be claimed on days *cum res aguntur*, of which, under Marcus Aurelius, there were 230 in the year. (GAI. ii. 279; DEMANGEAT, i. 790.)

The *fideicommissum* itself did not, like a legacy, directly transfer the property in an inheritance or in any particular thing, and of course did not give any right to a real action. The giving up of the inheritance was, however, effected by the mere consent of the heir, even before tradition.

2. Imprimis igitur sciendum est, opus esse, ut aliquis recto jure testamento heres instituatur ejusque fidei committatur, ut eam hereditatem alii restituat: alioquin inutile est testamentum, in quo nemo heres instituitur. Cum igitur aliquis scripserit: 'Lucius Titius heres esto,' poterit adicere: 'rogo te, Luci Titi, ut, cum primum possis hereditatem meam adire, eam Gaio Seio reddas, restituas'. Potest autem quisque et de parte restituenda heredem rogare: et liberum est vel pure vel sub condicione relinquere fideicommissum vel ex die certo.

2. We must first observe that some one must be duly appointed heir in the testament; and then it must be entrusted to his good faith to give over the inheritance to some other person; for otherwise the testament is ineffectual, as being one in which no one is instituted heir. And, therefore, when a testator has said, 'Let Lucius Titius be my heir,' he may add, 'and I request you, Lucius Titius, that, so soon as you can enter upon my inheritance, you will make over and give it up to Gaius Seius'. A testator may also request his heir to give over a part of the inheritance only, and may leave the *fideicommissum* absolutely or conditionally, or from a certain day.

GAI. ii. 248, 250.

Of course, if there was no heir instituted, there could be no person to charge by testament with the trust (*nemo fiduciarius*); but the testator might charge the *heredes ab intestato* (par. 10).

The person who made the *fideicommissum* was termed the *fideicommittens;* the person requested to perform it, *fiduciarius;* and the person to be benefited by it, *fideicommissarius.*

3. Restituta autem hereditate, is quidem, qui restituit, nihilo minus heres permanet: is vero, qui recipit hereditatem, aliquando heredis aliquando legatarii loco habebatur.

3. After an heir has restored the inheritance, he still continues heir. But he, who receives the inheritance, was formerly sometimes considered in the light of an heir, and sometimes in that of a legatee.

GAI. ii. 251.

In order to protect himself, the heir who remained liable to all actions of creditors against the inheritance had recourse to a fiction of law. He sold *nummo seslertio* the inheritance to the *fideicommissarius,* and they entered into mutual agreements called *emptæ et venditæ hereditatis stipulationes* (GAI. ii. 252), by which the *fiduciarius,* though remaining in the eye of the law responsible for the charges upon the inheritance, was protected from ultimate harm by having a remedy against the *fideicommissarius,* who in his turn bargained that the *fiduciarius* would hand everything over. Thus Gaius says of the *fideicommissarius,* '*Olim nec heredis loco erat, nec legatarii: sed potius emptoris*'.

4. Et in Neronis quidem temporibus Trebellio Maximo et Annæo Seneca consulibus senatusconsultum factum est quo cautum est, ut si cui hereditas ex fideicommissi causa restituta sit, omnes actiones, quæ jure civili heredi et in heredem competerent, ei et in eum darentur, cui ex fideicommisso restituta esset hereditas. Post quod senatusconsultum prætor utiles actiones ei et in eum, qui recepit hereditatem, quasi heredi et in heredem dare cœpit.

4. During the reign of Nero, in the consulship of Trebellius Maximus and Annæus Seneca, a *senatusconsultum* was passed, providing that, after an inheritance had been restored under a *fideicommissum,* all actions, which by the civil law might be brought by or against the heir, should be permitted for and against him to whom the inheritance was restored. After this, the prætor began to give equitable actions for and against the person who received an inheritance, as if for and against an heir.

GAI. ii. 253; D. xxxi. 1. 2.

The *senatusconsultum Trebellianum* (A.D. 62) did away with the necessity of any such fiction as that of a sale. The *fideicommissarius* stepped at once into the place of the *heres institutus.* All the actions belonging to the inheritance were given him in the shape of *actiones utiles.* (See Introd. sec. 106.) If creditors sued the *heres institutus,* he had the *exceptio restitutæ hereditatis;* he might plead that he had given over the inheritance as he had been directed.

5. Sed quia heredes scripti, cum aut totam hereditatem aut pæne totam plerumque restituere rogabantur, adire hereditatem ob nullum vel minimum lucrum recusabant atque ob id extinguebantur fideicommissa; postea Vespasiani Augusti temporibus Pegaso et Pusione consulibus senatus censuit, ut ei, qui rogatus esset hereditatem restituere, perinde liceret quartam partem retinere, atque lege Falcidia ex legatis retinere conceditur. Ex singulis quoque rebus, quæ per fideicommissum relinquuntur, eadem retentio permissa est. Post quod senatusconsultum ipse heres onera hereditaria sustinebat: ille autem, qui ex fideicommisso recepit partem

5. But the instituted heirs, being in most cases requested to restore the whole, or almost the whole of an inheritance, often refused to accept it, as they would receive little or no advantage, and thus *fideicommissa* were frequently extinguished; and therefore, subsequently, during the reign of the Emperor Vespasian, in the consulship of Pegasus and Pusio, the senate decreed, that an heir, who was requested to restore an inheritance, might retain a fourth, just as in the case of legacies he might by the Falcidian law. And the same deduction is allowed in particular things, which are left by a *fideicommissum.* For some time after this *senatusconsultum* the heir alone bore the charges of the inheritance;

hereditatis, legatarii partiarii loco erat, id est ejus legatarii, cui pars bonorum legabatur. Quæ species legati partitio vocabatur, quia cum herede legatarius partiebatur hereditatem. Unde quæ solebant stipulationes inter heredem et partiarium legatarium interponi, eædem interponebantur inter eum, qui ex fideicommisso recepit hereditatem, et heredem, id est ut et lucrum et damnum hereditarium pro rata parte inter eos commune sit.

and he who had received a share or part of an inheritance, under a *fideicommissum*, was regarded as a part legatee, that is, a legatee having a legacy of a share of the property, a species of legacy which was called partition, because the legatee took a part of the inheritance together with the heir. Thus the same stipulations which were formerly in use between the heir and partiary legatee, were likewise made between the person who received the inheritance under the *fideicommissum* and the heir, that is, they stipulated they would share the benefits and the charges of the inheritance between them, in proportion to their respective interests.

GAI. ii. 254.

The *senatusconsultum Trebellianum* (A.D. 62) protected the *fiduciarius* from any harm; but it gave him no incitement to enter on the inheritance. Why should he take an inheritance which he had instantly to transfer to another? The trust might thus perish; and, to remedy this, the *senatusconsultum Pegasianum* (A.D. 73) permitted the *heres institutus* to retain a fourth just as the *lex Falcidia* permitted in the case of legacies. Even the term *quarta Falcidia* was applied to the fourth retained by the *fiduciarius heres*. (D. xxxvi. 1. 16. 9.) The *fideicommissarius* in this respect became exactly like a legatee. As having a definite part of the inheritance, he was considered in the light of a legatee of a part of the inheritance, and, as the text says (par. 3), the *fideicommissarius* was, under the *senatusconsultum Trebellianum* (A.D. 62), placed in the position of an heir, and under the *senatusconsultum Pegasianum* (A.D. 73) in that of a legatee.

A testator sometimes gave a legatee not a particular thing, but a certain share in his whole property. The legatee (then termed *legatarius partiarius*) took, in this case, *per universitatem;* but he was not thereby made an heir, not having been formally instituted; and if there was no heir who entered on the inheritance, the legacy was extinguished. The claims of creditors against the inheritance were made exclusively against the heir, and the heir alone could recover sums due to the inheritance. Thus it was necessary that, if the heir paid a creditor, the legatee should account to him for a part of the payment proportionate to his share of the inheritance; while if the legatee wished that his share should be increased by the payment of a debt due to the inheritance, he could only effect this through the heir. Accordingly they made stipulations with each other, termed *stipulationes partis et pro parte*. By one of these stipulations the heir bound the legatee to pay a proportion of sums expended in satisfaction of claims against the inheritance; by the other the legatee bound the heir to account

to him for his share of sums received in satisfaction of debts owing to the inheritance. The *fideicommissarius* was on the footing of such a legatee under the *senatusconsultum Pegasianum*, and the *stipulationes partis et pro parte* were made between the heir and the *fideicommissarius*.

6. Ergo si quidem non plus quam dodrantem hereditatis scriptus heres rogatus sit restituere, tunc ex Trebelliano senatusconsulto restituebatur hereditas et in utrumque actiones hereditariæ pro rata parte dabantur: in heredem quidem jure civili, in eum vero, qui recipiebat hereditatem, ex senatusconsulto Trebelliano tamquam in heredem. At si plus quam dodrantem vel etiam totam hereditatem restituere rogatus sit, locus erat Pegasiano senatusconsulto, et heres, qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinuerit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinebat. Sed quarta quidem retenta, quasi partis et pro parte stipulationes interponebantur tamquam inter partiarium legatarium et heredem: si vero totam hereditatem restituerit, emptæ et venditæ hereditatis stipulationes interponebantur. Sed si recuset scriptus heres adire hereditatem ob id, quod dicat, eam sibi suspectam esse quasi damnosam, cavetur Pegasiano senatusconsulto, ut desiderante eo, cui restituere rogatus est, jussu prætoris adeat et restituat hereditatem perindeque ei et in eum, qui recipit hereditatem, actiones dentur, acsi juris est ex Trebelliano senatusconsulto: quo casu nullis stipulationibus opus est, quia simul et huic, qui restituit, securitas datur et actiones hereditariæ ei et in eum transferuntur, qui recipit hereditatem, utroque senatusconsulto in hac specie concurrente.

6. Therefore, if the instituted heir was not requested to restore more than three-fourths of the inheritance, he restored such part in accordance with the provisions of the *senatusconsultum Trebellianum;* and all actions which concern an inheritance, might be brought against each according to their respective shares—against the heir, by the civil law, and against him who received the inheritance, by the *senatusconsultum Trebellianum*, as though against an heir. But if the instituted heir was requested by the testator to restore the whole inheritance, or more than three-fourths, then the *senatusconsultum Pegasianum* became applicable; and the heir who had once entered on the inheritance, provided he did so voluntarily, was obliged to sustain all the charges of the inheritance, whether he had retained or had declined to retain his fourth. When the heir did retain a fourth part, what are called stipulations *partis et pro parte* were entered into, just as between a legatee of part and an heir; and, when the heir did not retain a fourth, then stipulations *emptæ et venditæ hereditatis* were entered into. But if the instituted heir refused to enter on the inheritance, alleging that he feared he should lose by doing so, it was provided, by the *senatusconsultum Pegasianum*, that, on the demand of him to whom he had been requested to restore the inheritance, he should, under an order of the prætor, enter on the inheritance, and give it over; and that all actions might be brought by or against him who received the inheritance, as in a case falling under the *senatusconsultum Trebellianum*. And in this case stipulations are not necessary, for the heir, who restores the inheritance, is secured, and all actions concerning an inheritance are transferred to and against him, by whom it is received, there being, in this instance, a concurrent application of both *senatusconsulta*.

GAI. i. 255-258.

The *senatusconsultum Trebellianum* was not abrogated by the *Pegasianum*. They applied to different cases. If the fourth was expressly reserved to the *heres fiduciarius*, he took the other three parts, and immediately restored or transferred them to the *fideicommissarius*, who had the position of *heres fideicommissarius*, and all the actions belonging to the inheritance, so far as his share extended. But if the fourth was not reserved, the *senatusconsultum Pegasianum* became applicable. The *fiduciarius heres* retained the fourth, and the *fideicommissarius* held the position of a legatee. The *heres institutus* might, however, not choose to retain the fourth. He might enter on the inheritance, and at once voluntarily transfer the whole to the *fideicommissarius*. The jurists were divided in opinion as to the *senatusconsultum* under which he then entered. (D. xxxvi. 1. 45.) Gaius thinks it was under the *Pegasianum*, for the *actiones hereditariæ* did not pass without stipulations. (GAI. ii. 257.) If he refused to enter on the inheritance, the prætor compelled him, by a power given in the *senatusconsultum Pegasianum*, and he was placed exactly in the same position as if he had entered under the *senatusconsultum Trebellianum*. He had no fourth reserved for him; and all actions passed at once to the *fideicommissarius*.

7. Sed quia stipulationes ex senatusconsulto Pegasiano descendentes et ipsi antiquitati displicuerunt et quibusdam casibus captiosas eas homo excelsi ingenii Papinianus appellat et nobis in legibus magis simplicitas quam difficultas placet, ideo omnibus nobis suggestis tam similitudinibus quam differentiis utriusque senatusconsulti, placuit exploso senatusconsulto Pegasiano, quod postea supervenit, omnem auctoritatem Trebelliano senatusconsulto præstare, ut ex eo fideicommissariæ hereditates restituantur, sive habeat heres ex voluntate testatoris quartam sive plus sive minus sive penitus nihil, ut tunc, quando vel nihil vel minus quarta apud eum remaneat, liceat ei vel quartam vel quod deest, ex nostra auctoritate retinere vel repetere solutum, quasi ex Trebelliano senatusconsulto pro rata portione actionibus tam in heredem quam in fideicommissarium competentibus. Si vero totam hereditatem sponte restituerit, omnes hereditariæ actiones fideicommissario et adversus eum competunt; sed etiam id, quod præcipuum Pegasiani senatusconsulti fuerat, ut, quando recusabat heres scriptus sibi datam hereditatem adire, necessitas ei imponeretur

7. But, as the stipulations, which arose from the *senatusconsultum Pegasianum*, were displeasing even to the ancients, and Papinian, a man of great genius, considers them in some cases as captious; and as we prefer simplicity to complexity in matters of law, we have been pleased, upon comparing the points of agreement and disagreement in these two *senatusconsulta*, to abrogate the *senatusconsultum Pegasianum*, which was subsequent to the *senatusconsultum Trebellianum*, and to give an exclusive authority to the *senatusconsultum Trebellianum*, by which all fideicommissary inheritances shall be restored for the future, whether the testator has given by his will a fourth part of his estate to the instituted heir, or more, or less, or nothing at all, so that, when nothing is given to the heir, or less than a fourth part, he may be permitted to retain a fourth, or as much as will make up the deficiency, by virtue of our authority, or to demand repayment of it if he has paid it over; and actions may be brought both against the heir and the *fideicommissarius* according to their respective interests, as if under the *senatusconsultum Trebellianum*. But, should the heir voluntarily restore the whole inheritance, all actions concerning an inheritance may be brought

totam hereditatem volenti fideicommissario restituere et omnes ad eum et contra eum transirent actiones, et hoc transposuimus ad senatusconsultum Trebellianum, ut ex hoc solo et necessitas heredi imponatur, si ipso nolente adire fideicommissarius desiderat restitui sibi hereditatem, nullo nec damno nec commodo apud heredem manente.

by or against the *fideicommissarius*. And, as to the most important provision of the *senatusconsultum Pegasianum*, that, when an instituted heir refused to accept an inheritance, he might be constrained to restore it to the *fideicommissarius* if he demanded it, and that all actions should be transferred to and against him, we have transferred this provision to the *senatusconsultum Trebellianum*, by which alone this obligation is now laid upon the heir, when he himself refuses to enter on the inheritance, and the *fideicommissarius* is desirous that it should be restored, the heir in this case receiving neither gain nor loss.

Justinian unites the two *senatusconsulta* into one, giving them the name of the *senatusconsultum Trebellianum*. The heir is to retain a fourth, as under the *senatusconsultum Pegasianum*, but actions are to be brought for or against the heir and the *fideicommissarius* in proportion to their shares, the *fideicommissarius* being thus *in loco heredis* as to his share, as under the *senatusconsultum Trebellianum*. If the heir would not enter, then he was compelled to do so, but was protected against all loss, as under the *senatusconsultum Pegasianum*.

Repetere solutum. Before the legislation of Justinian, the *heres* could not re-demand the fourth, if he had once paid it over. (PAUL. *Sent.* iv. 3, 4.)

8. Nihil autem interest, utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogatur, an ex parte heres institutus aut totam partem aut partis partem restituere rogatur: nam et hoc casu eadem observari præcepimus, quæ in totius hereditatis restitutione diximus.

8. But it makes no difference whether the heir is instituted to the whole inheritance, and is requested to restore the whole or a part, or whether, being instituted to a part only, he is requested to restore that entire part, or a portion of it; for we enjoin that the same rules be observed in the latter case, as in case of restitution of the whole.

GAI. ii. 259.

9. Si quis una aliqua re deducta sive præcepta, quæ quartam continet, veluti fundo vel alia re, rogatus sit restituere hereditatem, simili modo ex Trebelliano senatusconsulto restitutio fiat, perinde ac si quarta parte retenta rogatus esset reliquam hereditatem restituere. Sed illud interest, quod altero casu, id est cum deducta sive præcepta aliqua re restituitur hereditas in solidum ex eo senatusconsulto actiones transferuntur et res, quæ remanet apud heredem, sine ullo onere hereditario apud eum manet, quasi ex legato ei

9. If an heir is requested by a testator to give up an inheritance, after deducting or excepting some particular thing, equivalent to a fourth of the whole, as a piece of land, or anything else, he will give it up under the *senatusconsultum Trebellianum*, exactly as if he had been requested to restore the remainder of an inheritance, after retaining a fourth. But there is this difference: in the first case, when an heir is requested to give up an inheritance, after deducting or excepting a particular thing, then, according to that *senatuscon-*

adquisita, altero vero casu, id est cum, quarta parte retenta, rogatus est heres restituere hereditatem et restituit, scindantur actiones et pro dodrante quidem transferantur ad fideicommissarium, pro quadrante remaneant apud heredem. Quin etiam licet in una re, qua deducta aut præcepta, restituere aliquis hereditatem rogatus est, maxima pars hereditatis contineatur, æque in solidum transferuntur actiones et secum deliberare debet is, cui restituitur hereditas, an expediat sibi restitui. Eadem scilicet interveniunt et si duabus pluribusve rebus deductis præceptisve restituere hereditatem rogatus sit. Sed et si certa summa deducta præceptave, quæ quartam vel etiam maximam partem hereditatis continet, rogatus sit aliquis hereditatem restituere, idem juris est. Quæ diximus de eo, qui ex asse heres institutus est, eadem transferimus et ad eum, qui ex parte heres scriptus est.

sultum, all actions are transferred to and against the *fideicommissarius*, and what remains to the heir is free from all incumbrances connected with the inheritance, as if acquired by legacy. In the second case, when an heir is requested to give up an inheritance after retaining a fourth to himself, all actions are proportionably divided; those which regard the three-fourths of the estate being transferred to the *fideicommissarius*, and those which regard the one-fourth remaining to the heir. And, even if an heir is requested to give up an inheritance, after making a deduction or exception of some particular thing, which comprises the greatest part of the whole inheritance, all actions are still transferred to the *fideicommissarius*, who ought then to consider whether it will be expedient or not, that the inheritance should be given up to him. All this applies equally, whether an heir is requested to give up an inheritance after a deduction or exception of two, or more, particular things, or of a certain sum of money, which may comprise a fourth or even the greatest part of the inheritance. What we have said of an heir who is instituted to the whole of an inheritance, applies equally to one who is instituted only to a part.

D. xxxvi. 1. 1. 16. 21; D. xxxvi. 1. 30. 3.

If the testator gave a particular object to the *heres institutus* which was equal in value to the fourth of the inheritance, the law considered this as a specific legacy given to the *heres*. The *fideicommissarius* took the whole inheritance except this part, and all the actions of the whole inheritance were transferred to him. If the particular object did not equal a fourth, Marcian says that the emperor would not suffer the heir to claim any addition. (D. xxxvi. 1. 30. 4.) Justinian retains the distinction between a particular object being given, and a general direction to retain a fourth. But he decides that if a particular object was given not equal in value to a fourth, the heir may retain enough to complete his fourth, and that all actions relating to the part so retained shall pass to him, and all others to the *fideicommissarius*. (Cod. vi. 50. 11.)

10. Præterea intestatus quoque moriturus potest rogare eum, ad quem bona sua vel legitimo jure vel honorario pertinere intellegit, ut hereditatem suam totam partemve ejus aut rem aliquam, veluti fundum,

10. Moreover, a man about to die intestate may request the person, to whom he knows his estate will pass, either by the civil or prætorian law, to give up to a third person the whole inheritance, or a part of it, or any par-

hominem, pecuniam alicui restituat: cum alioquin legata nisi ex testamento non valeant.

ticular thing, as a piece of land, a slave, or a sum of money. Legacies, on the contrary, are only valid when given by testament.

GAI. ii. 270.

Antoninus Pius extended the provisions of the *lex Falcidia* and consequently of the *senatusconsultum Pegasianum* (D. xxxv. 2. 18), and the jurists those of the *senatusconsultum Trebellianum*, to trusts imposed on *heredes ab intestato*. (D. xxxvi. 6. 1.)

11. Eum quoque, cui aliquid restituitur, potest rogare, ut id rursus alii totum aut partem vel etiam aliud aliquid restituat.

11. A *fideicommissarius* may also himself be requested to give up to another either the whole or part of what he receives, or even something else.

GAI. ii. 271.

The *fideicommissarius*, who was thus only a vehicle to pass on the inheritance to another *fideicommissarius*, could not retain a fourth for himself, if the heir had already retained a fourth. The object of the *lex Falcidia* was merely to secure an heir, not in all cases to give a fourth to the person who virtually had the inheritance; but when the heir entered on the inheritance by order of the prætor, and therefore did not retain a fourth, then the *fideicommissarius* stood in the place of the heir, so far as to be able to apply the *lex Falcidia*, as if representing the heir, against legatees, but not against a second *fideicommissarius*. (D. xxxvi. 1. 63. 11.)

12. Et quia prima fideicommissorum cunabula a fide heredum pendent et tam nomen quam substantiam acceperunt et ideo divus Augustus ad necessitatem juris ea detraxit: nuper et nos, eundem principem superare contendentes, ex facto, quod Tribonianus vir excelsus, quæstor sacri palatii, suggessit, constitutionem fecimus, per quam disposuimus: si testator fidei heredis sui commisit, ut vel hereditatem vel speciale fideicommissum restituat, et neque ex scriptura neque ex quinque testium numero, qui in fideicommissis legitimus esse noscitur, res possit manifestari, sed vel pauciores quam quinque vel nemo penitus testis intervenerit, tunc sive pater heredis sive alius quicumque sit, qui fidem elegit heredis et ab eo aliquid restitui voluerit, si heres perfidia tentus adimplere fidem recusat negando, rem ita esse subsecutam, si fideicommissarius jusjurandum ei detulerit, cum prius

12. Originally all fiduciary gifts depended only upon the good faith of the heir: whence they took their name as well as their character. To remedy this, the Emperor Augustus made them obligatory in law, and we have lately endeavoured to surpass that prince; and, on the occasion of a case brought to our notice by the most eminent Tribonian, quæstor of our sacred palace, we have enacted by a constitution, that if a testator has entrusted to the faith of his heir the restoration of an inheritance, or any particular thing, and the fact cannot be proved either by any writing or by five witnesses (the legal number in such cases), there having been fewer, or perhaps no witnesses present, then, whether it is his father who has thus trusted to the good faith of the heir, and begged him to restore the inheritance, or whether it is any one else, if the heir perfidiously refuses to carry out the trust and denies the whole transaction, the *fideicommissarius*, having previ-

ipse de calumnia juraverit, necesse eum habere vel jusjurandum subire, quod nihil tale a testatore audivit, vel recusantem ad fideicommissi vel universitatis vel specialis solutionem coartari, ne depereat ultima voluntas testatoris fidei heredis commissa. Eadem observari censuimus et si a legatario vel fideicommissario aliquid similiter relictum sit. Quodsi is, a quo relictum dicitur, confiteatur quidem aliquid a se relictum esse, sed ad legis subtilitatem decurrat, omnimodo cogendus est solvere.

ously himself sworn to his own good faith, may put the heir to his oath; and thus force him either to deny upon oath having received any such trust, or to fulfil it, whether it relate to the whole inheritance or to some particular thing; and this is allowed, lest the last wishes of a testator, committed to the faith of an heir, should be defeated. The same process may be adopted against a legatee, or a *fideicommissarius* charged with a restitution. And if any one so charged admits the trust, but endeavours to shelter himself in the subtleties of the law, he may in all cases be compelled to perform his duty.

C. vi. 42. 32.

De calumnia juraverit, that is, he must swear beforehand that he is acting *bona fide*, and not inventing a ground of litigation.

Tit. XXIV. DE SINGULIS REBUS PER FIDEICOMMISSUM RELICTIS.

Potest autem quis etiam singulas res per fideicommissum relinquere, veluti fundum, hominem, vestem, argentum, pecuniam numeratam, et vel ipsum heredem rogare, ut alicui restituat, vel legatarium, quamvis a legatario legari non possit.

A person may also leave particular things by a *fideicommissum*, as a piece of land, a slave, a garment, gold, silver, pieces of money; and he may request either his heir to give them over, or a legatee, although a legatee cannot be charged with a legacy.

Gai. ii. 260, 271.

1. Potest autem non solum proprias testator res per fideicommissum relinquere, sed et heredis aut legatarii aut fideicommissarii aut cujuslibet alterius. Itaque et legatarius et fideicommissarius non solum de ea re rogari potest, ut eam alicui restituat, quæ ei relicta sit, sed etiam de alia, sive ipsius sive aliena sit. Hoc solum observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento ceperit; nam quod amplius est, inutiliter relinquitur. Cum autem aliena res per fideicommissum relinquitur, necesse est ei, qui rogatus est, aut ipsam redimere et præstare aut æstimationem ejus solvere.

1. A testator may leave by *fideicommissum*, not only his own property, but also that of his heir, of a legatee, of a *fideicommissarius*, or of any other person; so that a legatee or *fideicommissarius* may not only be requested to give what has been left to him, but also something else, whether his own or the property of another. The only rule to be observed is, that no one shall be requested to give over more than he has received under the testament: for as to the excess the disposition is ineffectual. And, when the property of another is left by a *fideicommissum*, the person requested to give it over is obliged either to purchase and deliver the thing itself, or to pay its estimated value.

Gai. ii. 261, 262; D. xxxvi. 1. 1. 17.

Ulpian (*Reg.* 25. 5) expresses the power of disposal by *fidei-*

commissum, by saying that everything could be disposed of in that way, that could be given by a legacy *per damnationem*.

Quod amplius est, inutiliter relinquitur. If, however, the thing which the *fideicommissarius* was to give belonged to himself, he was obliged to give it, whatever might be its value, if he accepted what was given to him by the *fideicommissum*, as he was considered to have had an opportunity of exercising his judgment, and not to have valued his own thing more highly than that which he received. (D. xl. 5. 24. 12.)

2. Libertas quoque servo per fideicommissum dari potest, ut heres eum rogetur manumittere vel legatarius vel fideicommissarius. Nec interest, utrum de suo proprio servo testator roget, an de eo, qui ipsius heredis aut legatarii vel etiam extranei sit. Itaque alienus servus redimi et manumitti debet: quodsi dominus eum non vendat, si modo nihil ex judicio ejus, qui reliquit libertatem, percepit, non statim extinguitur fideicommissaria libertas, sed differtur, quia possit tempore procedente, ubicumque occasio redimendi servi fuerit, præstari libertas. Qui autem ex causa fideicommissi manumittitur, non testatoris fit libertus, etiamsi testatoris servus sit, sed ejus, qui manumittit: at is, qui directo testamento liber esse jubetur, ipsius testatoris fit libertus, qui etiam orcinus appellatur. Nec alius ullus directo ex testamento libertatem habere potest, quam qui utroque tempore testatoris fuerit, et quo faceret testamentum et quo moreretur. Directo autem libertas tunc dari videtur, cum non ab alio servum manumitti rogat, sed velut ex suo testamento libertatem ei competere vult.

2. Freedom may also be conferred upon a slave by a *fideicommissum*: for an heir, legatee, or *fideicommissarius* may be requested to enfranchise him; nor does it signify whether it is of his own slave that the testator requests the manumission, or of the slave of his heir, or of a legatee, or of a stranger; and therefore, when a slave is not the testator's own property, he must be bought and enfranchised. But, if the proprietor of the slave refuses to sell him, as he may, if he has taken nothing under the testament, yet the freedom given by the *fideicommissum* is not extinguished, but deferred only, as it may be possible in the course of time, on any occasion offering of purchasing the slave, to effect his enfranchisement. The slave who is enfranchised in pursuance of a *fideicommissum*, does not become the freedman of the testator, although he was the testator's own slave, but he becomes the freedman of that person who enfranchises him. But a slave who receives his liberty directly from the testament becomes the freedman of the testator, and is said to be *orcinus*; and no one can obtain liberty directly by testament, unless he was the slave of the testator, both at the time of the testator's making his testament, and also at that of his death. Liberty is given directly, when a testator does not request that freedom be given to his slave by another, but gives it himself by virtue of his own testament.

GAI. ii. 263-267; C. vii. 4. 6, 7.

It was the opinion of Gaius, that if the master of the slave refused to sell the slave, the *fideicommissum* perished, because liberty was a thing not admitting of computation in money. (GAI. ii. 265.) Justinian, in accordance with a rescript of the Emperor Alexander (C. vii. 4. 6), decides that it is only delayed.

If a testator enfranchised directly a slave that could not be

so enfranchised, the gift of liberty would be as valid as a *fideicommissum*.

Orcinus, from *Orcus;* because he is the freedman of a dead person.

3. Verba autem fideicommissorum hæc maxime in usu habeantur: peto, rogo, volo, mando, fidei tuæ committo. Quæ perinde singula firma sunt, atque si omnia in unum congesta essent.

3. The terms generally used in making *fideicommissa* are the following: I request, I ask, I desire, I commit, I entrust to thy good faith; and each of them is of as much force separately as all of them placed together.

GAI. ii. 249.

Antoninus Pius decided by rescript that *commendo* would not suffice (D. xxxii. 11. 2); but, in the time of Justinian, the expressions by which a *fideicommissum* was created were quite immaterial, provided that the wishes of the testator could be ascertained.

TIT. XXV. DE CODICILLIS.

Ante Augusti tempora constat jus codicillorum non fuisse, sed primus Lucius Lentulus, ex cujus persona etiam fideicommissa cœperunt, codicillos introduxit. Nam cum decederet in Africa, scripsit codicillos testamento confirmatos, quibus ab Augusto petiit per fideicommissum, ut faceret aliquid: et cum divus Augustus voluntatem ejus implesset, cujus deinceps reliqui auctoritatem secuti, fideicommissa præstabant et filia Lentuli legata, quæ jure non debebat, solvit, dicitur Augustus convocasse prudentes, inter quos Trebatium quoque, cujus tunc auctoritas maxima erat, et quæsisse, an possit hoc recipi nec absonans a juris ratione codicillorum usus esset: et Trebatium suasisse Augusto, quod diceret, utilissimum et necessarium hoc civibus esse propter magnas et longas peregrinationes, quæ apud veteres fuissent, ubi, si quis testamentum facere non posset, tamen codicillos posset. Post quæ tempora cum et Labeo codicillos fecisset, jam nemini dubium erat, quin codicilli jure optimo admitterentur.

Codicils were certainly not recognised by law before the reign of Augustus; for Lucius Lentulus, to whom also the origin of *fideicommissa* may be traced, was the first who introduced codicils. When dying in Africa, he wrote codicils, which were confirmed by his testament; and in these he requested Augustus by a *fideicommissum* to do something for him. The emperor complied with the request, and, following his example, the other persons joined with him carried out the *fideicommissa* entrusted to them, and the daughter of Lentulus paid legacies which in strictness of law were not due from her. It is said that Augustus, having called together upon this occasion persons learned in the law, and among others Trebatius, whose opinion was of the greatest authority, asked whether codicils could be admitted, and whether they were not repugnant to the principles of law. Trebatius advised the emperor to admit them, as they were most convenient and necessary to citizens, on account of the great and long journeys which the ancients were frequently obliged to take, during which a man who could not make a testament, might be able to make codicils. And subsequently, Labeo himself having made codicils, no one afterwards doubted their perfect validity.

Codicilli were small tablets on which memorandums or letters were written. A testator might naturally address a short letter giving short directions to his heir. When *fideicommissa* came to be enforced, these letters or directions were enforced as creating *fideicommissa*. As under the Roman law a testator could make no alteration in his testament without making an entirely new testament, the use of codicils was obviously great. Codicils might be made without there being any testament at all. They were then directions addressed to the *heredes ab intestato*. But if there was a testament, they were always considered as attached to it: if the testamentary dispositions failed, they failed also, and all their provisions were taken with reference to the time when the testament was made. (D. xxix. 7. 2. 2 and 3. 2.)

A testator, by inserting an express clause to that effect, termed by commentators *clausula codicillaris*, might provide that his testament, if invalid as a testament, should take effect in the way of codicils. (C. vi. 36. 8. 1.)

As to Labeo and Trebatius, see Introd. sec. 20.

It is to be noticed that *codicilli* does not mean, like the English word 'codicil,' a supplement to a will, but 'directions by tablets,' and that directions so made should be held obligatory constituted an innovation as great in the form of testamentary disposition as the recognition of *fideicommissa* constituted in the latitude of testamentary power.

1. Non tantum autem testamento facto potest quis codicillos facere, sed et intestatus quis decedens fideicommittere codicillis potest. Sed cum ante testamentum factum codicilli facti erant, Papinianus ait, non aliter vires habere, quam si speciali postea voluntate confirmentur. Sed divi Severus et Antoninus rescripserunt, ex his codicillis, qui testamentum præcedunt, posse fideicommissum peti, si appareat, eum, qui postea testamentum fecerat, a voluntate, quam codicillis expresserat, non recessisse.

1. Not only a person who has already made his testament, may make codicils, but even a person dying intestate may create *fideicommissa* by codicils. But when codicils are made before a testament, they cannot take effect, according to Papinian, unless confirmed by a special disposition in the testament. But the Emperors Severus and Antoninus have decided by rescript, that a thing, left in trust by codicils, made before a testament, may be demanded by the *fideicommissarius*, if it appears that the testator has not abandoned the intention which he expressed in the codicils.

Gai. ii. 270.

There was a distinction between codicils confirmed by testament, and those not so confirmed; for if codicils were confirmed by testament, their provisions could operate to give legacies or appoint a tutor, and not only to create *fideicommissa*. A testator could, by anticipation, confirm in his testament any codicils he might thereafter make. (D. xxix. 7. 8 pr.)

2. Codicillis autem hereditas neque dari neque adimi potest, ne confundatur jus testamentorum et

2. An inheritance can neither be given nor taken away by codicils, as the different effect of testaments and

codicillorum, et ideo nec exheredatio scribi. Directo autem hereditas codicillis neque dari neque adimi potest: nam per fideicommissum hereditas codicillis jure relinquitur. Nec condicionem heredi instituto codicillis adicere neque substituere directo potest.

codicils would be thereby confounded, and of course, therefore, no heir can be disinherited by codicils. But it is only directly that an inheritance can neither be given nor taken away by codicils, for it may be legally disposed of in codicils by means of a *fideicommissum*. Nor, again, can a condition be imposed on an heir instituted by testament, nor can a direct substitution be made, by codicils.

GAI. ii. 273; D. xxix. 7. 6. pr.

3. Codicillos autem etiam plures quis facere potest: et nullam sollemnitatem ordinationis desiderant.

3. A person may make several codicils, and no formality is requisite in making them.

D. xxix. 7. 6. 1.

Codicils were not originally subjected to any rules determining the mode in which they were made. But by a constitution of Theodosius, added to by Justinian, they were to be made in presence of five witnesses, and, if made in writing, which was not necessary, the witnesses were to subscribe them. If codicils were not so made, then the *fideicommissarius* could, after having sworn to his own good faith, call on the heir to deny them on oath. (C. vi. 36. 8. 3.) For the *jusjurandum* see Tit. 23. 12.

LIBER TERTIUS.

TIT. I. DE HEREDITATIBUS, QUÆ AB INTESTATO DEFERUNTUR.

Intestatus decedit, qui aut omnino testamentum non fecit aut non jure fecit aut id, quod fecerat, ruptum irritumve factum est aut nemo ex eo heres extitit.

A person dies intestate, who either has made no testament at all, or has made one not legally valid; or if the testament he has made is revoked, or made ineffectual; or if no one becomes heir under it.

D. xxxviii. 16. 1. pr.

If a person died without a testament, the law regulated the succession to the inheritance. So also it did, if he left a testament that was fatally defective in form (*non jure factum*), or if his testament was revoked, or, in the language of Roman law, broken (*ruptum*), or if it was set aside as inofficious, or made ineffectual by a change of *status* in the testator (*irritum*), or if no heir would accept the inheritance under it.

If there was no testament to determine the succession, the law of the Twelve Tables gave the inheritance first to the *sui heredes*, who were also *necessarii heredes*, that is, could not refuse to accept the inheritance; then to the *agnati;* and then, if the deceased was a member of a *gens*, to the *gentiles*. In default of *agnati*, the prætor called to the inheritance the *cognati*, or blood-relations. (See Introd. sec. 45.) Perhaps the succession of *gentiles* lasted to a time later than the introduction of this prætorian succession of the *cognati;* but at any rate, it did not outlast the Republic, and therefore, speaking of the times when we are most familiar with Roman law, we may say that the succession was given first to the *sui heredes*, then to the *agnati*, then to the *cognati*. But some complication was introduced into the rules of succession, by certain classes of persons being, by different changes in the law, raised from the rank of *agnati* to that of *sui heredes*, and from the rank of *cognati* to that of *agnati*. These changes are not, however, very difficult to follow, if we divide them according as they were effected (1) by the prætor, (2) by *senatusconsulta*, and imperial enactments pre-

vious to Justinian, (3) by Justinian himself. The first Title treats of the succession of *sui heredes*, and of those ranked among the *sui heredes;* the second and two following Titles treat of the succession of *agnati*, and of those ranked among *agnati*. At the end of this Title will be found a short summary of the changes in the law relative to the succession of *sui heredes;* at the end of the fourth Title one will be found of the changes relative to the succession of *agnati*.

Justinian altered the whole mode of succession to intestates by the 118th and 127th Novels. This change, being effected several years after the publication of the Institutes, should not be allowed to interfere with the consideration of the law of succession existing when the Institutes were published. But as it is too remarkable and too well known a part of Justinian's legislation to remain wholly unnoticed, a short account of it will be given at the end of the ninth Title, which closes the part of the Institutes treating of successions *ab intestato*.

Before we enter on the details of intestate succession, it may be useful to consider generally the position of the heir under an intestacy, according as there was (1) no will at all, nor any expression of last wishes; (2) no will, but *codicilli* creating a *fideicommissum;* (3) a will under which the appointed heir or heirs would not enter.

1. If there was no will, the *sui heredes*, being *necessarii*, had, under the old law, to accept the inheritance with all its burdens. The prætor, however, allowed them the *beneficium abstinendi* (see Bk. ii. Tit. 19. 2 note), but any act by which they mixed themselves up with the inheritance terminated their power of abstaining. If there were no *sui heredes*, or those who were *sui heredes* refused, then all others, whether ranked by the prætor with *sui heredes*, or in a lower grade of succession, were in the position of *extranei heredes*, and had the inheritance offered to them according to their priorities, and had to make their decision within a given time (*cretio :* see Bk. ii. Tit. 19. 5) to accept or not, any act by which they behaved as heirs (*pro herede gerere*) being regarded as a sign of acceptance.

2. If there was no will, but a *fideicommissum* was cast upon the heir under the intestacy by *codicilli*, the heir had the choice of abstaining if a *suus heres*, or of accepting if an *extraneus heres;* and if he accepted he had, after satisfying creditors, to carry out the *fideicommissum*, retaining a fourth for himself, or if he was compelled to enter he was protected against all loss. (See Bk. ii. Tit. 23. 7.)

3. If there was a will, but neither the testamentary heirs nor, failing them, any heir in the line of intestate succession would enter under the will, and the *fiscus* would not accept (see Tit. 9. 3 note), the inheritance might be assigned to any one who was willing to give security for the satisfaction of the claims of creditors, in order that gifts of freedom to slaves might be sustained, and that the reputation of the deceased might not suffer. (See Tit. 11.)

The heir under the intestacy might accept when he was insolvent, with a view of profiting by the estate of the deceased to the detriment of creditors, and then the creditors might ask that the property of the deceased should be kept distinct from the property of the heir (*beneficium separationis*, see Bk. ii. Tit. 19. 1 note).

The heir under an intestate succession, as also the heir under a will, enforced his civil rights to the inheritance by a *petitio hereditatis* which was heard before the *centumviri* (see Introd. sec. 92; Bk. ii. Tit. 18. pr. note; Bk. iv. Tit. 6. 28), and his prætorian rights by applying to the prætor for an interdict, which was ordinarily that termed *quorum bonorum* (see Introd. sec. 107; Tit. 9. 1 note).

1. Intestatorum autem hereditates ex lege duodecim tabularum primum ad suos heredes pertinent.

1. The inheritances of intestates, by the law of the Twelve Tables, belong in the first place to the *sui heredes*.

GAI. iii. 1.

2. Sui autem heredes existimantur, ut et supra diximus, qui in potestate morientis fuerunt: veluti filius filia, nepos neptisve ex filio, pronepos proneptisve ex nepote filio, nato prognatus prognatave. Nec interest, utrum naturales sunt liberi an adoptivi. Quibus connumerari necesse est etiam eos, qui ex legitimis quidem matrimoniis non sunt progeniti, curiis tamen civitatum dati secundum divalium constitutionum, quæ super his positæ sunt, tenorem suorum jura nanciscuntur: nec non eos, quos nostræ amplexæ sunt constitutiones, per quas jussimus, si quis mulierem in suo contubernio copulaverit non ab initio affectione maritali, eam tamen, cum qua poterat habere conjugium, et ex ea liberos sustulerit, postea vero affectione procedente etiam nuptialia instrumenta cum ea fecerit filiosque vel filias habuerit: non solum eos liberos, qui post dotem editi sunt, justos et in potestate esse patribus, sed etiam anteriores, qui et his, qui postea nati sunt, occasionem legitimi nominis præstiterunt: quod optinere censuimus, etiamsi non progeniti fuerint post dotale instrumentum confectum liberi vel etiam nati ab hac luce subtracti fuerint. Ita demum tamen nepos neptisve et pronepos proneptisve suorum heredum numero sunt, si præcedens persona desierit in potestate parentis esse, sive morte

2. And, as we have observed before, those are *sui heredes* who, at the death of the deceased, were under his power; as a son or a daughter, a grandson or a granddaughter by a son, a great-grandson or great-granddaughter by a grandson born of a son; nor does it make any difference whether these children are natural or adopted. We must also reckon among them those who, though not born in lawful wedlock, nevertheless, according to the tenor of the imperial constitutions, acquire the rights of *sui heredes* by being presented to the *curiæ* of their cities; as also those to whom our own constitutions refer, which enact that if any person has lived with a woman not originally intending to marry her, but whom he is not prohibited to marry, and shall have children by her, and shall afterwards, feeling towards her the affection of a husband, enter into an act of marriage with her, and have by her sons or daughters, not only those born after the settlement of the dowry shall be legitimate, and in the power of their father, but also those born before, who gave occasion to the legitimacy of the children born after. And this rule shall obtain, although no children are born subsequent to the making of the dotal act, or those born are all dead. But a grandson or granddaughter, a great-grandson or great-granddaughter, is not reckoned among the *sui heredes*, unless the person pre-

id acciderit sive alia ratione, veluti emancipatione: nam si per id tempus, quo quis moreretur, filius in potestate ejus sit, nepos ex eo suus heres esse non potest. Idque et in ceteris deinceps liberorum personis dictum intellegimus. Postumi quoque qui, si vivo parente nati essent, in potestate futuri forent, sui heredes sunt.

ceding them in degree has ceased to be under the power of the ascendant, either by death or some other means, as by emancipation. For, if a son, when the grandfather died, was under the power of his father, the grandson cannot be *suus heres* of his grandfather; and so with regard to all other descendants. Posthumous children, also, who would have been under the power of the ascendant if they had been born in his lifetime, are *sui heredes.*

GAI. iii. 2; C. v. 27. 3, 10, 11.

The *sui heredes* were the children, whether natural, adoptive, or made legitimate (see Bk. i. Tit. 10. 13), in the power of the deceased at the time of his death. We must not confuse persons made *sui heredes* by the later legislation, as these legitimated children were, with those permitted to rank with *sui heredes.*

3. Sui autem etiam ignorantes fiunt heredes et, licet furiosi sint, heredes possunt existere: quia quibus ex causis ignorantibus adquiritur nobis, ex his causis et furiosis adquiri potest. Et statim morte parentis quasi continuatur dominium: et ideo nec tutoris auctoritate opus est in pupillis, cum etiam ignorantibus adquiritur suis heredibus hereditas: nec curatoris consensu adquiritur furioso, sed ipso jure.

3. *Sui heredes* may become heirs, without their knowledge, and even though insane; for in every case in which inheritances may be acquired without our knowledge, they may also be acquired by the insane. At the death of the father, ownership in an inheritance is at once continued; accordingly, the authority of a tutor is not necessary, since an inheritance may be acquired by *sui heredes* even without their knowledge; neither does an insane person acquire by assent of his curator, but by operation of law.

D. xxxviii. 16. 14.

Directly the succession *ab intestato* commenced, which it did when the deceased died if there was no testament, and as soon as it was ascertained that the testament was ineffectual if a testament had been made, the *suus heres* became at once heir without any act of his own. We may, however, apply here what we have already said of the power to abstain altogether from the inheritance given him by the prætor. (See Bk. ii. Tit. 19. 2.)

4. Interdum autem, licet in potestate mortis tempore suus heres non fuit, tamen suus heres parenti efficitur, veluti si ab hostibus quis reversus fuerit post mortem partis sui: jus enim postliminii hoc facit.

4. But sometimes a child becomes a *suus heres,* although he was not under power at the death of his parent; as when a person returns from captivity after the death of his father. He is then made a *suus heres* by the *jus postliminii.*

5. Per contrarium evenit, ut licet quis in familia defuncti sit mortis tempore, tamen suus heres non fiat, veluti si post mortem suam pater judicatus fuerit reus perduellionis ac per hoc memoria ejus damnata

5. On the contrary, it may happen that a child who, at the death of his parent, was under his power, is not his *suus heres:* as when a parent, after his decease, is adjudged to have been guilty of treason, and his memory is

fuerit: suum enim heredem habere non potest, cum fiscus ei succedit. Sed potest dici, ipso jure esse suum heredem, sed desinere.

thus made infamous. He can then have no *suus heres*, as it is the *fiscus* that succeeds to his estate. In this case it may be said that there has in law been a *suus heres*, but that he has ceased to be so.

D. xxxviii. 16. 1. 3.

As a general rule, if the accused died before conviction, the prosecution was at an end. His succession went to his heirs by testament or in law. But to this there was one exception. If a person charged with *perduellio* (treason against the state or emperor) died before conviction, the prosecution was continued, and if he was found guilty, his memory was said to be condemned (*memoria damnata fuit*), and, his sentence having a retrospective effect, his property was confiscated exactly as if he had been condemned in his lifetime. (D. xlviii. 4. 11.)

6. Cum filius filiave et ex altero filio nepos neptisve extant, pariter ad hereditatem vocantur nec qui gradu proximior est, ulteriorem excludit: æquum enim esse videtur, nepotes neptesque in patris sui locum succedere. Pari ratione et si nepos neptisque sit ex filio et ex nepote pronepos proneptisve, simul vocantur. Et quia placuit, nepotes neptesque, item pronepotes proneptesque in parentis sui locum succedere, conveniens esse visum est, non in capita, sed in stirpes hereditatem dividi, ut filius partem dimidiam hereditatis habeat et ex altero filio duo pluresve nepotes alteram dimidiam. Item si ex duobus filiis nepotes extant et ex altero unus forte aut duo, ex altero tres aut quattuor, ad unum aut duos dimidia pars pertinet, ad tres vel ad quattuor altera dimidia.

6. A son, or a daughter, and a grandson or granddaughter by another son, are called equally to the inheritance; nor does the nearer in degree exclude the more remote; for it seems just that grandsons and granddaughters should succeed in the place of their father. For the same reason a grandson or granddaughter by a son, and a great-grandson or great-granddaughter by a grandson, are called together. And since grandsons and granddaughters, great-grandsons and great-granddaughters, succeed in place of their parent, it appeared to follow that inheritances should not be divided *in capita*, but *in stirpes*; so that a son should possess one half, and the grandchildren, whether two or more, of another son, the other half of an inheritance. So, where there are grandchildren by two sons, one or two perhaps by the one, and three or four by the other, the inheritance will belong, half to the grandchild or the two grandchildren by the one son, and half to the three or four grandchildren by the other son.

GAI. iii. 7, 8.

The expressions '*in stirpes*' and '*in capita*' may be rendered, 'by the stock' and 'by the head'. An inheritance is divided 'by the head' when each head or person of those who take has an equal share in it; it is divided 'by the stock' when one share is distributed among all who are descended from one stock, i.e. are descended from the person who would, if he had been living, have taken the whole share.

7. Cum autem quæritur, an quis suus heres existere potest: eo tempore quærendum est, quo certum est, aliquem sine testamento decessisse: quod accidit et destituto testamento. Hac ratione si filius exheredatus fuerit et extraneus heres institutus est, filio mortuo postea certum fuerit, heredem institutum ex testamento non fieri heredem, aut quia noluit esse heres aut quia non potuit: nepos avo suus heres existet, quia quo tempore certum est, intestatum decessisse patremfamilias, solus invenitur nepos. [Et hoc certum est.]

7. When it is asked, whether such a person is a *suus heres*, we must look to the time at which it is certain that the deceased died without a testament, including therein the case of no heir claiming under the testament. Thus, if a son is disinherited and a stranger is instituted heir, and after the death of the son it becomes certain that the instituted heir will not be heir, because he is either unwilling or unable to be so, in this case the grandson of the deceased becomes the *suus heres* of his grandfather; for, at the time when it was certain that the deceased died intestate, there exists only the grandchild. Of this there can be no doubt.

D. xxxviii. 16. 1. 8.

8. Et licet post mortem avi natus sit, tamen avo vivo conceptus, mortuo patre ejus posteaque deserto avi testamento, suus heres efficitur. Plane si et conceptus et natus fuerit post mortem avi, mortuo patre suo desertoque postea avi testamento, suus heres avo non existit, quia nullo jure cognationis patrem sui patris tetigit. Sic nec ille est inter liberos avo, quem filius emancipatus adoptaverat. Hi autem cum non sunt quantum ad hereditatem liberi, neque bonorum possessionem petere possunt quasi proximi cognati. Hæc de suis heredibus.

8. And although a child is born after the death of his grandfather, yet, if he was conceived in the lifetime of his grandfather, he will, if his father is dead, and his grandfather's testament is abandoned by the heir, become the *suus heres* of his grandfather. Obviously a child both conceived and born after the death of his grandfather, cannot become the *suus heres*, although his father should die and the testament of his grandfather be abandoned; because he has never been connected with his grandfather by any tie of relationship. Neither is a person adopted by an emancipated son to be reckoned among the children of the father of his adoptive father. And not only are these adoptive children of an emancipated son incapable of taking the inheritance as children of the deceased grandfather, but they cannot demand possession of the goods as the nearest *cognati*. Thus much concerning *sui heredes*.

D. xxxviii. 16. 6, 7.

9. Emancipati autem liberi jure civili nihil juris habent: neque enim sui heredes sunt, quia in potestate esse desierunt parentis, neque alio ullo jure per legem duodecim tabularum vocantur. Sed prætor naturali æquitate motus dat eis bonorum possessionem unde liberi, perinde ac si in potestate parentis mortis tempore fuissent, sive soli sint sive cum suis heredibus concurrant. Itaque duobus liberis extantibus,

9. Emancipated children by the civil law have no right to the inheritance of their ascendant; being no longer under his power, they are not his *sui heredes*, nor are they called to inherit by any other right under the law of the Twelve Tables. But the prætor, obeying natural equity, grants them the possession of goods called *undè liberi*, as if they had been under the power of their ascendant at the time of his death, and this, whether

emancipato et qui mortis tempore in potestate fuerit, sane quidem is, qui in potestate fuerit, solus jure civili heres est, id est solus suus heres est: sed cum emancipatus beneficio prætoris in partem admittitur, evenit, ut suus heres pro parte heres fiat.

they stand alone, or whether there are also others, who are *sui heredes*. Thus, when there are two children, one emancipated, and the other under power at his father's death, the latter, by the civil law, is alone the heir, and alone the *suus heres;* but, as the emancipated son, by the indulgence of the prætor, is admitted to his share, the *suus heres* becomes heir only of a part.

GAI. iii. 19, 25, 26; D. xxxviii. 6. 1. 9.

Not only emancipated children, but, if they themselves were dead, their children conceived after the emancipation, had the *possessio bonorum* given them by the prætor (D. xxxvii. 4. 5); and a grandchild conceived before the emancipation, and who remained in the power of the grandfather, was allowed to succeed to the inheritance of the emancipated son. (D. xxxvii. 4. 6. pr.) The prætor could not give these persons the title of 'heir,' as that belonged only to those who received it from the *jus civile;* but he gave them *possessio bonorum unde liberi.* (See Tit. 9. 3 note.) If the emancipated son had children who remained in the power of the emancipator, he shared the inheritance with them, instead of excluding them. (D. xxxvii. 8. 1. pr. and 1.) Emancipated children were, however, obliged to bring into, and add to, the inheritance all the property they themselves possessed at the time of the father's death, except *peculium castrense* and *quasi-castrense* (*collatio bonorum*); because, if they had remained in the family, all that they had acquired would have been acquired for the *paterfamilias*, and thus have formed part of the inheritance; and a married daughter succeeding as *heres suus* had to bring into the inheritance her *dos* (*collatio dotis*). (C. vi. 20. 4.) When a person, after a *capitis deminutio*, was *restitutus in integrum*, he also had the *possessio bonorum* given him, and received what he would have had if his disability had not prevented him from succeeding as *suus heres*. (D. xxxvii. 4. 1. 9.)

10. At hi, qui emancipati a parente in adoptionem se dederunt, non admittuntur ad bona naturalis patris quasi liberi, si modo cum is moreretur, in adoptiva familia sint. Nam vivo eo emancipati ab adoptivo patre perinde admittuntur ad bona naturalis patris, ac si emancipati ab ipso essent nec umquam in adoptiva familia fuissent: et convenienter, quod ad adoptivum patrem pertinet, extraneorum loco esse incipiunt. Post mortem vero naturalis patris emancipati ab adoptivo et quantum ad hunc æque extraneorum loco fiunt et, quantum ad naturalis parentis bona pertinet, nihilo magis

10. But those, who after emancipation have given themselves in adoption, are not admitted as children to the possession of the effects of their natural father, that is, if, at the time of his death, they are still in their adoptive family. But if, in the lifetime of their natural father, they have been emancipated by their adoptive father, they are then admitted to the possession of the goods of their natural father exactly as if they had been emancipated by him, and had never entered into the adoptive family. Accordingly, with regard to their adoptive father, they become from that moment strangers to him. But if

liberorum gradum nanciscuntur: quod ideo sic placuit, quia iniquum erat, esse in potestate patris adoptivi, ad quos bona naturalis patris pertinerent, utrum ad liberos ejus an ad adgnatos.

they are emancipated by their adoptive father after the death of their natural father, they are equally considered as strangers to their adoptive father; and yet do not gain the position of children with regard to the inheritance of their natural father. This has been so laid down, because it was unreasonable that it should be in the power of an adoptor to determine to whom the inheritance of a natural father should belong, whether to his children, or to the *agnati.*

D. xxxvii. 4. 6. 4.

Until the time of Justinian, an adopted son, during his continuance in his adoptive family, had no right of succession to his natural father, but was a *suus heres* of his adoptive father. If he left the adoptive family before the death of his natural father, he was called by the prætor to the succession of his natural father as a *suus heres*, but had, of course, no claim on the adoptive father. If he left the adoptive family after the death of his natural father, he had no claim to the succession of either natural or adoptive father, except as a *cognatus* of his natural father. Justinian, as we have seen in the First Book (Tit. 11. 2), altered this, and the adopted son, unless adopted by an ascendant, never lost his right to the succession of his natural father, although he gained a right to the succession *ab intestato* of his adoptive father. (See paragr. 14.) Justinian, it will be observed, does not in the text speak of the case of children given in adoption by their natural father, the changes he had made having altered their position. He speaks of children emancipated, and then giving themselves by arrogation to an adoptive father, and their position was not changed by his system. What is said in the text may, however, be applied to children given in adoption before the legislation of Justinian. What the text describes as unreasonable is that, after the natural father is dead, the adoptive father should have power to alter the succession of the natural father.

11. Minus ergo juris habent adoptivi filii quam naturales. Namque naturales emancipati beneficio prætoris gradum liberorum retinent, licet jure civili perdunt: adoptivi vero emancipati et jure civili perdunt gradum liberorum et a prætore non adjuvantur. Et recte: naturalia enim jura civilis ratio perimere non potest nec, quia desinunt sui heredes esse, desinere possunt filii filiæve aut nepotes neptesve esse: adoptivi vero emancipati extraneorum loco incipiunt esse, quia jus nomenque filii filiæve, quod per adoptionem consecuti sunt, alia

11. The rights of adopted children are therefore less than those of natural children, who, even after emancipation, retain the rank of children by the indulgence of the prætor, although they lose it by the civil law. But adopted children, when emancipated, lose the rank of children by the civil law, and are not aided by the prætor. And the distinction is very proper, for the civil law cannot destroy natural rights; and children cannot cease to be sons or daughters, grandsons or granddaughters, by ceasing to be *sui heredes.* But adopted children, when emancipated, become instantly stran-

civili ratione, id est emancipatione, perdunt.

gers; for the rights and title of son or daughter, which they have only obtained by adoption, may be destroyed by another institution of the civil law, that, namely, of emancipation.

GAI. ii. 136, 137. See Bk. ii. Tit. 13. 4.

12. Eadem hæc observantur et in ea bonorum possessione, quam contra tabulas testamenti parentis liberis præteritis, id est neque heredibus institutis neque, ut oportet, exheredatis, prætor pollicetur. Nam eos quidem, qui in potestate parentis mortis tempore fuerunt, et emancipatos vocat prætor ad eam bonorum possessionem: eos vero, qui in adoptiva familia fuerunt per hoc tempus, quo naturalis parens moreretur, repellit. Item adoptivos liberos emancipatos ab adoptivo patre sicut ab intestato, ita longe minus contra tabulas testamenti ad bona ejus admittit, quia desinunt in liberorum numero esse.

12. The same rules are observed in the possession of goods which the prætor gives *contra tabulas* to children who have been passed over, that is, who have neither been instituted heirs, nor properly disinherited. For the prætor calls to this possession of goods those children under the power of their ascendant at the time of his death, and those also who are emancipated; but he excludes those who were in an adoptive family at the decease of their natural ascendant. So, too, adopted children emancipated by their adoptive father, as they are not admitted to succeed their adoptive father *ab intestato*, much less are they admitted to possess the goods of their adoptive father contrary to his testament, for they cease to be included in the number of his children.

D. xxxviii. 6. 1. 6; D. xxxvii. 4. 6. 4.

When a testament was made, but a person who was a *suus heres*, or who was raised to the rank of a *suus heres*, was not expressly disinherited in the testament, the prætor gave him the *possessio bonorum contra tabulas*, i.e. contrary to the testament. Such a person is not raised to the rank of a *suus heres* so much as maintained in his position of *suus heres*.

13. Admonendi tamen sumus, eos, qui in adoptiva familia sunt quive post mortem naturalis parentis ab adoptivo patre emancipati fuerint, intestato parente naturali mortuo, licet eâ parte edicti, qua liberi ad bonorum possessionem vocantur, non admittantur, alia tamen parte vocari, id est qua cognati defuncti vocantur. Ex qua parte ita admittuntur, si neque sui heredes liberi neque emancipati obstent neque adgnatus quidem ullus interveniat: ante enim prætor liberos vocat tam suos heredes quam emancipatos, deinde legitimos heredes, deinde proximos cognatos.

13. It is, however, to be observed that children still remaining in an adoptive family, or who have been emancipated by their adoptive father, after the decease of their natural father, who dies intestate, although not admitted by the part of the edict calling children to the possession of goods, are admitted by another part, by which the *cognati* of the deceased are called. They are, however, only thus admitted in default of *sui heredes*, emancipated children, and *agnati*. For the prætor first calls the children, both the *sui heredes* and those emancipated, then the *legitimi heredes*, and then the nearest *cognati*.

GAI. iii. 31; D. xxxviii. 8. 1. 4.

14. Sed ea omnia antiquitati quidem placuerunt: aliquam autem

14. Such were the rules that formerly obtained; but they have re-

emendationem a nostra constitutione acceperunt, quam super his personis posuimus, quæ a patribus suis naturalibus in adoptionem aliis dantur. Invenimus etenim nonnullos casus, in quibus filii et naturalium parentum successionem propter adoptionem amittebant et, adoptione facile per emancipationem soluta, ad neutrius patris successionem vocabantur. Hoc solito more corrigentes, constitutionem scripsimus, per quam definivimus, quando parens naturalis filium suum adoptandum alii dederit, integra omnia jura ita servari, atque si in patris naturalis potestate permansisset nec penitus adoptio fuerit subsecuta: nisi in hoc tantummodo casu, ut possit ab intestato ad patris adoptivi venire successionem. Testamento autem ab eo facto neque jure civili neque prætorio aliquid ex hereditate ejus persequi potest neque contra tabulas bonorum possessione agnita neque inofficiosi querela instituta, cum nec necessitas patri adoptivo imponitur vel heredem eum instituere vel exheredatum facere, utpote nullo naturali vinculo copulatum: neque si ex Sabiniano senatusconsulto ex tribus maribus fuerit adoptatus; nam et in hujusmodi casu neque quarta ei servatur nec ulla actio ad ejus persecutionem ei competit. Nostra autem constitutione exceptus est is, quem parens naturalis adoptandum susceperit: utroque enim jure tam naturali quam legitimo in hanc personam concurrente, pristina jura tali adoptioni servavimus, quemadmodum si paterfamilias sese dederit adrogandum. Quæ specialiter et singillatim ex præfatæ constitutionis tenore possunt colligi.

ceived some emendation from our constitution relating to persons given in adoption by their natural fathers. For cases have occurred in which sons have lost by adoption their succession to their natural ascendants, and, the tie of adoption being easily dissolved by emancipation, have lost the right of succeeding to either father. Correcting, therefore, as usual, what is wrong, we have promulgated a constitution enacting that, when a natural father has given his son in adoption, the rights of the son shall be preserved exactly as if he had still remained in the power of his natural father, and no adoption had taken place; except only in this, that the person adopted may succeed to his adoptive father, if he dies intestate. But, if the adoptive father makes a testament, the adopted son can neither by the civil law nor under the prætorian edict obtain any part of the inheritance, whether he demands possession of the effects *contra tabulas*, or alleges that the testament is inofficious; for an adoptive father is under no obligation to institute or disinherit his adopted son, there being no natural tie between them, not even if the adopted son has been chosen among three brothers, according to the *senatusconsultum Sabinianum*, for even in this case the son does not obtain the fourth part of his adoptive father's effects, nor has he any action whereby to claim it. But persons adopted by an ascendant are excepted in our constitution; for, as natural and civil rights both concur in their favour, we have thought proper to preserve to this adoption its effect under the old law, as also to the arrogation of a *paterfamilias*. But this, in all its details, may be collected from the tenor of the above-mentioned constitution.

C. viii. 47. 10. pr. 1, 2, 3.

Theophilus, in his Paraphrase, tells us that when a person adopted one of three male children, he was obliged, by the *senatusconsultum Sabinianum*, to leave him a fourth part of his property, but gives no reason for the rule, and we have no means of ascertaining what the true reason was. Justinian did away with the provision of the *senatusconsultum*, because it was not, under his legislation, necessary to protect specially the person thus chosen, inasmuch as no adopted child lost his share of his inheritance of his natural father. (Bk. i. Tit. 11. 2.)

Children adopted by a stranger were not, under Justinian's legislation, properly speaking, placed in the rank of *sui heredes*, but remained *sui heredes*, for the adoption had no effect on their position in their natural family. The effect of adoption was destroyed, not specially provided against.

15. Item vetustas, ex masculis progenitos plus diligens, solos nepotes vel neptes, qui ex virili sexu descendunt, ad suorum vocabat successionem et juri adgnatorum eos anteponebat: nepotes autem, qui ex filiabus nati sunt, et pronepotes ex neptibus cognatorum loco numerans, post adgnatorum lineam eos vocabat tam in avi vel proavi materni quam in aviæ vel proaviæ sive paternæ sive maternæ successionem. Divi autem principes non passi sunt talem contra naturam injuriam sine competenti emendatione relinquere: sed cum nepotis et pronepotis nomen commune est utrisque, qui tam ex masculis quam ex feminis descendunt, ideo eundem gradum et ordinem successionis eis donaverunt: sed ut aliquid amplius sit eis, qui non solum naturæ, sed etiam veteris juris suffragio muniuntur, portionem nepotum et neptium vel deinceps, de quibus supra diximus, paulo minuendam esse existimaverunt, ut minus tertiam partem acciperent, quam mater eorum vel avia fuerat acceptura, vel pater eorum vel avus paternus sive maternus, quando femina mortua sit, cujus de hereditate agitur, hisque, licet soli sint, adeuntibus adgnatos minime vocabant. Et quemadmodum lex duodecim tabularum filio mortuo nepotes vel neptes vel pronepotes et proneptes in locum patris sui ad successionem avi vocat: ita et principalis dispositio in locum matris suæ vel aviæ eos cum jam designata partis tertiæ deminutione vocat.

15. The ancient law, favouring descendants from males, called only grandchildren so descended to the succession as *sui heredes*, in preference to the *agnati*, while grandchildren born of daughters, and great-grandchildren born of granddaughters, were reckoned among *cognati*, and succeeded only after the *agnati* to their maternal grandfather and great-grandfather, or to their grandmother or great-grandmother, maternal or paternal. But the emperors would not suffer such a violence against nature to continue without an adequate alteration; and inasmuch as the name of grandchild and great-grandchild is common to descendants both by females and by males, they gave all the same right and order of succession. But, that persons whose privileges rest not only on nature, but also on the ancient law, might enjoy some peculiar advantage, they thought it right that the portions of grandchildren, great-grandchildren, and other lineal descendants of a female, should be somewhat diminished, so that they should not receive so much by a third part as their mother or grandmother would have received, or, when the succession is to the inheritance of a woman, as their father or grandfather, paternal or maternal, would have received; and, although there were no other descendants, if they entered on the inheritance, the emperors did not call the *agnati* to the succession. And as, upon the decease of a son, the law of the Twelve Tables calls the grandchildren and great-grandchildren, male and female, to represent their father in the succession to their grandfather, so the imperial legislation calls them to take in succession the place of their mother or grandmother, subject only to the above-mentioned deduction of a third part.

C. vi. 55. 9.

This section contains the substance of a constitution of the Emperors Theodosius, Valentinian, and Arcadius. (Cod. Theod. v. 5.) Justinian here says, that when there were descendants by a

female who entered on the inheritance, the *agnati* were not called to the succession. We gather, however, from the Code itself, that the *agnati* had, under this constitution, a fourth part of the inheritance, as a sort of *Falcidia*. (See next paragr.)

16. Sed nos, cum adhuc dubitatio manebat inter adgnatos et memoratos nepotes, partem quartam defuncti substantiæ adgnatis sibi vindicantibus ex cujusdam constitutionis auctoritate, memoratam quidem constitutionem a nostro codice segregavimus neque inseri eam ex Theodosiano codice in eo concessimus. Nostra autem constitutione promulgata toti juri ejus derogatum est et sanximus, talibus nepotibus ex filia vel pronepotibus ex nepte et deinceps superstitibus, adgnatos nullam partem mortui successionis sibi vindicare, ne hi, qui ex transversa linea veniunt, potiores his habeantur, qui recto jure descendunt: quam constitutionem nostram optinere secundum sui vigorem et tempora et nunc sancimus. Ita tamen quemadmodum inter filios et nepotes ex filio antiquitas statuit non in capita sed in stirpes dividi hereditatem, similiter nos inter filios et nepotes ex filia distributionem fieri jubemus, vel inter omnes nepotes et neptes et alias deinceps personas, ut utraque progenies matris suæ vel patris, aviæ vel avi portionem sine ulla deminutione consequantur, et, si forte unus vel duo ex una parte, ex altera tres aut quattuor extent, unus aut duo dimidiam, alteri tres aut quattuor alteram dimidian hereditatis habeant.

16. But, as there still remained matter of dispute between the *agnati* and the above-mentioned grandchildren, the *agnati* claiming the fourth part of the estate of the deceased by virtue of a constitution, we have rejected this constitution, and have not permitted it to be inserted into our code from that of Theodosius. And in the constitution we have ourselves promulgated, we have completely departed from the provisions of this former constitution, and have enacted that *agnati* shall take no part in the succession of the deceased, when there are grandchildren born of a daughter, or great-grandchildren born of a granddaughter, or any other descendants from a female in the direct line; so that those in a collateral line may not be preferred to direct descendants. This constitution is to prevail from the date of its promulgation in its full force, as we here again enact. And as the old law ordered, that between the sons of the deceased and his grandsons by a son, every inheritance should be divided *in stirpes*, and not *in capita*, so we also ordain, that a similar distribution shall be made between sons and grandsons by a daughter, and between grandsons and granddaughters, great-grandsons and great-granddaughters, and all other descendants in a direct line; so that the children of either branch may receive the share of their mother or father, their grandmother or grandfather, without any diminution; and, if of the one branch there should be one or two children, and of the other branch three or four, then the one or two shall have one half, and the three or four the other half, of the inheritance.

C. vi. 55. 12.

Those who, not being *sui heredes*, were admitted to rank as such, were not *necessarii*. They could accept the inheritance or not, which they only acquired when they entered on it, *his adeuntibus*. (Paragr. 15.)

The principal changes in the succession of the *sui heredes* were these:—

1. Those at the time of his death in the power of the *de cujus*

(i.e. the person of whose inheritance we are speaking), and becoming *sui juris* by his death, succeeded as *sui heredes* under the law of the Twelve Tables.

2. The prætor, by giving them the *possessio bonorum*, placed in the rank of *sui heredes* the following classes of persons: (1) emancipated children; (2), if the emancipated father was dead, grandchildren conceived after his emancipation, or (3), if the *de cujus* was the emancipated son, his unemancipated children conceived before the emancipation; (4) *sui heredes* deprived of the power of inheriting by a *capitis deminutio*, but afterwards *restituti in integrum;* and (5) adopted children emancipated by the adoptive father during the life of the *de cujus*, their natural father.

3. A constitution of Theodosius permitted the children and descendants of deceased daughters to succeed to the portion their mother would have received as *suus heres*, giving up one-third of it to other *sui heredes*, if there were any, and, if not, one-fourth to the *agnati*.

4. Under Justinian, adoption by a stranger ceased to have any effect upon the position of the person adopted in his natural family; and the persons referred to in the constitution of Theodosius just mentioned succeeded to the whole share of the deceased daughter without any deduction.

TIT. II. DE LEGITIMA ADGNATORUM SUCCESSIONE.

Si nemo suus heres vel eorum, quos inter suos herèdes prætor vel constitutiones vocant, extat et qui successionem quoquo modo amplectatur: tunc ex lege duodecim tabularum ad adgnatum proximum hereditas pertinet.

When there is no *suus heres*, nor any of those persons called by the prætor or the constitutions to inherit with *sui heredes*, to take the succession in any way, the inheritance, according to the law of the Twelve Tables, belongs to the nearest *agnatus*.

GAI. iii. 9.

All persons were *agnati* who, descended from a common ancestor, would, if that ancestor had been living, and they themselves not emancipated, have been in his power. The *sui heredes* were thus *agnati;* but as they had the title of *sui heredes* peculiar to themselves, only those *agnati* received the name of *agnati* who were connected with the *de cujus* by a collateral line.

1. Sunt autem adgnati, ut primo quoque libro tradidimus, cognati per virilis sexus personas cognatione juncti, quasi a patre cognati. Itaque eodem patre nati fratres adgnati sibi sunt, qui et consanguinei vocantur, nec requiritur, an etiam eandem matrem habuerint. Item patruus fratris filio et invicem is illi adgnatus est. Eodem numero sunt fratres

1. *Agnati*, as we have explained in the First Book, are those *cognati* who are related through males, that is, are *cognati* by the father; and therefore brothers, who are the sons of the same father, are *agnati* to each other (they are also called *consanguinei*), and it is not asked whether they have the same mother. An uncle is also *agnatus* to his brother's son, and

patrueles, id est qui ex duobus fratribus procreati sunt, qui etiam consobrini vocantur. Qua ratione etiam ad plures gradus adgnationis pervenire poterimus. Hi quoque, qui post mortem patris nascuntur, nanciscuntur consanguinitatis jura. Non tamen omnibus simul adgnatis dat lex hereditatem, sed his, qui tunc proximo gradu sunt, cum certum esse cœperit, aliquem intestatum decessisse.

conversely, the brother's son to his paternal uncle. So also *fratres patrueles*, that is, the children of brothers (also called *consobrini*), are likewise *agnati*. We may thus reckon many degrees of agnation. Children, too, who are born after the decease of their father, obtain the rights of consanguinity. The law does not, however, give the inheritance to all the *agnati*, but to those only who are in the nearest degree at the time that it becomes certain that the deceased has died intestate.

GAI. i. 156; iii. 10. 11.

2. Per adoptionem quoque adgnationis jus consistit, veluti inter filios naturales et eos, quos pater eorum adoptavit (nec dubium est, quin proprie consanguinei appellentur); item si quis ex ceteris adgnatis tuis, veluti frater aut patruus aut denique is, qui longiore gradu est, aliquem adoptaverit, adgnatio inter vos esse non dubitatur.

2. The right of agnation arises also through adoption; thus the natural and the adopted sons of the same father are *agnati*. And such persons are without doubt properly included in the term *consanguinei*. Also, if one of your *agnati*, as, for example, a brother, a paternal uncle, or any other *agnatus*, however remote, adopts any one, then there is undoubtedly agnation between you.

3. Ceterum inter masculos quidem adgnationis jure hereditas etiam longissimo gradu ultro citroque capitur. Quod ad feminas vero ita placebat, ut ipsæ consanguinitatis jure tantum capiant hereditatem, si sorores sint, ulterius non capiant: masculi vero ad earum hereditates, etiam si longissimo gradu sint, admittantur. Qua de causa fratris tui aut patrui tui filiæ vel amitæ tuæ hereditas ad te pertinebat, tua vero ad illas non pertinebat. Quod ideo ita constitutum erat, quia commodius videbatur, ita jura constitui, ut plerumque hereditates ad masculos confluerent. Sed quia sane iniquum erat, in universum eas quasi extraneas repelli, prætor eas ad bonorum possessionem admittebat ea parte, qua proximitatis nomine bonorum possessionem pollicetur: ex qua parte ita scilicet admittuntur, si neque adgnatus ullus nec proximior cognatus interveniat. Et hæc quidem lex duodecim tabularum nullo modo introduxit, sed simplicitatem legibus amicam amplexa, simili modo omnes adgnatos sive masculos sive feminas cujuscumque gradus ad similitudinem suorum invicem ad successionem vocabat: media autem jurisprudentia, quæ

3. Agnation gives males, however distant in degree, reciprocal rights to the succession to inheritances. But it was thought right that females should only inherit by title of consanguinity if they were sisters, and not if in a more remote degree; while their male *agnati*, in however remote a degree, were admitted to succeed to them. Thus the inheritance of your brother's daughter, or of the daughter of your paternal uncle or aunt, would belong to you: but not your inheritance to them. This distinction was made, because it seemed expedient that the law should be so ordered, that inheritances should for the most part fall into the possession of males. But as it was contrary to equity that females should be thus almost wholly excluded as strangers, the prætor admits them to the possession of goods under the section of his edict giving possession of goods on account of proximity; but they are only admitted under this section if there is no *agnatus*, nor any nearer *cognatus* coming before them. The law of the Twelve Tables did not introduce any of these distinctions; but, with the simplicity proper to all legislation, called the *agnati* of either sex, or any degree, to a reciprocal succession, in the same

erat lege quidem duodecim tabularum junior, imperiali autem dispositione anterior, subtilitate quadam excogitata, præfatam differentiam inducebat et penitus eas a successione adgnatorum repellebat, omni alia successione incognita, donec prætores, paulatim asperitatem juris civilis corrigentes sive, quod deest, adimplentes, humano proposito alium ordinem suis edictis addiderunt et, cognationis linea proximitatis nomine introducta, per bonorum possessionem eas adjuvabant et pollicebantur his bonorum possessionem, quæ unde cognati appellatur. Nos vero legem duodecim tabularum sequentes et ejus vestigia in hac parte conservantes, laudamus quidem prætores suæ humanitatis, non tamen eos in plenum causæ mederi invenimus: quare etenim, uno eodemque gradu naturali concurrente et adgnationis titulis tam in masculis quam in feminis æqua lance constitutis, masculis quidem dabatur ad successionem venire omnium adgnatorum, ex adgnatis autem mulieribus nullis penitus nisi soli sorori ad adgnatorum successionem patebat aditus? Ideo in plenum omnia reducentes et ad jus duodecim tabularum eandem dispositionem exæquantes, nostra constitutione sanximus, omnes legitimas personas, id est per virilem sexum descendentes, sive masculini sive feminini generis sunt, simili modo ad jura successionis legitimæ ab intestato vocari secundum gradus sui prærogativam nec ideo excludendas, quia consanguinitatis jura sicuti germanæ non habent.

manner as *sui heredes*. It was an intermediate jurisprudence, posterior to the law of the Twelve Tables, but prior to the imperial constitutions, that in a spirit of subtle ingenuity introduced this distinction, and entirely excluded females from the succession of *agnati*, no other method of succession being then known, until the prætors, correcting by degrees the asperity of the civil law, or supplying what was deficient, were led by their feeling of equity to add in their edicts a new order of succession. The line of *cognati* was admitted according to the degrees of proximity, and relief was thus afforded to females by the prætor giving them the possession of goods called *unde cognati*. But we, turning to the law of the Twelve Tables, and following in its steps in our legislation on this point, praise the kind feeling of the prætors, but cannot think they have provided a complete remedy for the evil. Why, indeed, when males and females are placed in the same degree of natural relationship, and have equally the title of agnation, should males be permitted to succeed to all their *agnati*, while females, with the single exception of sisters, are entirely excluded? We therefore, bringing back everything to what it was, and conforming our scheme to that of the Twelve Tables, have declared by our constitution, that all *legitimæ personæ*, that is descendants from males, whether themselves male or female, shall be equally called to the rights of legal succession *ab intestato*, according to the proximity of their degree, and shall not be excluded on the ground that they have not the right of consanguinity which sisters have.

GAI. iii. 14, 23, 29; C. vi. 58. 14.

The *media jurisprudentia* here spoken of consisted of the opinions of the *jurisprudentes*, who extended the principle of the *lex Voconia* (B.C. 169), which limited the succession of females under a testament, to their succession *ab intestato*. *Feminæ ad heredidates legitimas ultra consanguineas successiones non admittuntur. Idque jure civili Voconiana ratione videtur effectum.* (PAUL. *Sent.* 4. 8. 22.) Thus a distinction was made among the *agnati* themselves and the *consanguinei*, that is, *agnati* in the second degree; or, in other words, brothers and sisters, natural or adoptive, of the *de cujus*, were made into a class apart and distinguished from the *agnati* properly so called. *Consan-*

guineus, when used to mark off a particular class of the *agnati*, merely means children of the same father, without any reference to the mother.

4. Hoc etiam addendum nostræ constitutioni existimavimus, ut transferatur unus tantummodo gradus a jure cognationis in legitimam successionem, ut non solum fratris filius et filia secundum quod jam definivimus, ad successionem patrui sui vocentur, sed etiam germanæ consanguineæ vel sororis uterinæ filius et filia soli et non deinceps personæ una cum his ad jura avunculi sui perveniant et mortuo eo, qui patruus quidem est fratris sui filiis, avunculus autem sororis suæ suboli, simili modo ab utroque latere succedant, tamquam si omnes ex masculis descendentes legitimo jure veniant, scilicet ubi frater et soror superstites non sunt (his etenim personis præcedentibus et successionem admittentibus ceteri gradus remanent penitus semoti): videlicet hereditate non in stirpes, sed in capita dividenda.

4. We have also thought fit to add to our constitution, that one whole degree, but only one, shall be transferred from the line of *cognati* to the legal succession. Not only the son and daughter of a brother, as we have just explained, shall be called to the succession of their paternal uncle, but together with them the son or daughter of a sister, though she is only by the same father or only by the same mother (but no one in a more distant degree than a son and daughter of such a sister), shall also be admitted to the succession of their maternal uncle. Thus, when a person dies who is a paternal uncle to the children of his brother, and maternal uncle to the children of his sister, then the children of either branch succeed exactly as if they were all descendants from males, and had a right by law to the succession. But this is only if the deceased leaves no brother or sister, for if he leaves any and they accept the inheritance, the more remote degrees are entirely excluded from the inheritance, as it is to be divided *in capita* and not *in stirpes*.

C. vi. 58. 14. 6, 7.

The children of a sister, although only *consanguinea*, that is, having the same father, or *uterina*, having the same mother, were thus admitted to the succession as *agnati*. We might gather from this that uterine brothers and sisters themselves were admitted, although it is not expressed in the text. The code contains a constitution of Justinian (C. vi. 56. 7) expressly admitting them. The changes in the law with respect to the admission of brothers and sisters and their children as *agnati* were as follows:—In A.D. 498 Anastasius gave the rights of agnation to emancipated brothers and sisters, except that they only received one half of what they would have had if they had remained in the family. (See Tit. 5. 1.) The children of emancipated brothers and sisters still remained *cognati* only. Justinian gave the rights of agnation, in A.D. 528, to uterine brothers and sisters (C. vi. 56. 7); and in A.D. 531, to the children of uterine sisters (C. vi. 58. 14. 6); and though the children of uterine brothers are not mentioned in the constitution, they must undoubtedly have been placed in the same position. Finally, in a constitution dated October, A.D. 534 (C. vi. 58. 15), and therefore subsequent to the promulgation of the Institutes, Justinian admitted as *agnati* emancipated brothers and sisters

without any deduction of a fourth, uterine brothers and sisters, and nephews and nieces being the children either of emancipated or uterine brothers and sisters. After that constitution there were not, therefore, any but *agnati* in the second degree, nor any in the third degree except the uncles and aunts of the *de cujus*.

Agnatorum hereditates dividuntur in capita. (ULP. *Reg.* 26. 4.) There was no division *per stirpes*, which was originally only a consequence of the *patria potestas*, in the succession of *agnati*. If one of those in any degree of relationship was dead, his representatives did not take his share. He was entirely passed over, and the others in that degree of relationship were alone called to the succession.

Agnati were spoken of as *legitimi heredes* (cf. *legitimi tutores*, Bk. i. Tit. 15. pr.), because the inheritance was given to them by the law of the Twelve Tables, whereas the *cognati* only received it from the prætor.

5. Si plures sint gradus adgnatorum, aperte lex duodecim tabularum proximum vocat: itaque si verbi gratia sit frater defuncti et alterius fratris filius aut patruus, frater potior habetur. Et quamvis singulari numero usa lex proximum vocet, tamen dubium non est, quin et, si plures sint ejusdem gradus, omnes admittantur: nam et proprie proximus ex pluribus gradibus intellegitur et tamen dubium non est, quin, licet unus sit gradus adgnatorum, pertineat ad eos hereditas.

5. When there are many degrees of *agnati*, the law of the Twelve Tables expressly calls the nearest; if, for example, there is a brother of the deceased, and a son of another brother, or a paternal uncle, the brother is preferred. And, although the law of the Twelve Tables calls the nearest *agnatus* (in the singular number), yet without doubt, if there are several in the same degree, they ought all to be admitted. And, although properly by the nearest degree must be understood the nearest of several, yet, if all the *agnati* are in the same degree, the inheritance undoubtedly belongs to them all.

GAI. iii. 15.

6. Proximus autem, si quidem nullo testamento facto quisque decesserit, per hoc tempus requiritur, quo mortuus est is, cujus de hereditate quæritur. Quodsi facto testamento quisquam decesserit, per hoc tempus requiritur, quo certum esse cœperit, nullum ex testamento heredem extaturum: tum enim proprie quisque intellegitur intestatus decessisse. Quod quidem aliquando longo tempore declaratur: in quo spatio temporis sæpe accidit, ut proximiore mortuo proximus esse incipiat, qui moriente testatore non erat proximus.

6. When a man dies without a testament, the nearest *agnatus* is the *agnatus* who is nearest at the time of the death of the deceased. But, if he dies after having made a testament, then he is the nearest who is so when it becomes certain that there will be no testamentary heir; for it is only then that a man who has made a testament can be said to have died intestate, and this sometimes is uncertain for a long time. Meanwhile, the nearest *agnatus* may die, and some one become the nearest who was not so at the death of the testator.

GAI. iii. 13.

7. Placebat autem, in eo genere percipiendarum hereditatum successionem non esse, id est quamvis proximus, qui secundum ea quæ

7. But it was settled that in this order of succession there should be no devolution, that is to say, that if the nearest *agnatus*, called in the manner

diximus, vocatur ad hereditatem, aut spreverit hereditatem aut, antequam adeat, decesserit, nihilo magis legitimo jure sequentes admittuntur. Quod iterum prætores imperfecto jure corrigentes, non in totum sine adminiculo relinquebant, sed ex cognatorum ordine eos vocabant, utpote adgnationis jure eis recluso. Sed nos nihil deesse perfectissimo juri cupientes, nostra constitutione sanximus, quam de jure patronatus, humanitate suggerente, protulimus, successionem in adgnatorum hereditatibus non esse eis denegandam, cum satis absurdum erat, quod cognatis a prætore apertum est, hoc adgnatis esse reclusum, maxime cum in onere quidem tutelarum et primo gradu deficiente, sequens succedit et, quod in onere optinebat, non erat in lucro permissum.

we have mentioned to the inheritance, either refused it, or died before he entered on it, those following him in agnatic succession were not thereby admitted to succeed him. Here, too, the prætors, though not introducing a complete reform, did not leave the *agnati* wholly without relief, but ordered that they should be called to the inheritance as *cognati*, since they were debarred from the rights of agnation. But we, desirous that our law should be as complete as possible, by our constitution, which we were prompted by regard for equity to publish concerning the right of patronage, have decided that a devolution in the succession shall not be denied to *agnati*. It was indeed absurd to refuse them a right which the prætor gave to *cognati*, especially as the burden of tutelage devolved on the remoter degree of *agnati*, if there was a failure of the nearer, and thus the principle of devolution was admitted to impose burdens, and was not admitted to confer advantages.

GAI. ii. 12, 22, 25, 28.

In hereditate legitima successioni locus non est. (PAUL. *Sent.* 4. 8. 23.) The *suus heres* or *sui heredes* in the nearest degree became heirs by force of law. But as to those who were only allowed to rank among the *sui heredes* without being, strictly speaking, *sui heredes*, if those in the nearest degree refused to accept the inheritance, or died before entering on it, the succession did not devolve upon any other *sui heredes*, but went at once to the *agnati*. (D. xxxviii. 16. 1. 8.) If, in this case or any other, the nearest *agnatus* refused or died before entering on the inheritance, the succession passed to the *cognati* without first devolving on any of the more remote *agnati*. Justinian alters this; and under his system there was a devolution of the succession to the *agnati*, and therefore probably to those ranked among the *sui heredes*.

8. Ad legitimam successionem nihilo minus vocatur etiam parens, qui contracta fiducia filium vel filiam, nepotem vel neptem ac deinceps emancipat. Quod ex nostra constitutione omnimodo inducitur, ut emancipationes liberorum semper videantur contracta fiducia fieri, cum apud antiquos non aliter hoc optinebat, nisi specialiter contracta fiducia parens manumisisset.

8. An ascendant also is called to the legal succession who has emancipated a son, a daughter, a grandson, a granddaughter, or other descendant under a fiduciary agreement. And by our constitution, every emancipation of children is now considered to have been made under such an agreement, while among the ancients the ascendant was never called to the succession unless he had expressly made this agreement at the time of the emancipation.

D. xxxviii. 16. 10 ; C. viii. 48. 6.

Under the old law the ascendant had nothing to do with the succession *ab intestato* of his descendant; for if the descendant was in the power of the ascendant, the latter took all the property of which the former could dispose, but did not, as belonging to him by right of his *patria potestas*. If the descendant was emancipated, he was no longer in the family of the ascendant. The emancipated son, in short, had no *agnati;* and in default of *sui heredes* the inheritance went to his patron, that is, to the person who had emancipated him. This was the fictitious purchaser (see Introd. sec. 42), unless the ascendant who emancipated him made an agreement (*contracta fiducia*) with the purchaser by which the purchaser made himself a trustee of the right of patronage for the ascendant. If this was done, the ascendant succeeded in default of *sui heredes*.

By the later imperial constitutions three changes were made in the position of the ascendant. First, by a constitution of Theodosius and Valentinian (C. vi. 61. 3), and subsequently of Leo and Anthemius (C. vi. 61. 4), and lastly of Justinian (C. vi. 59. 11), in the case of goods coming to a son from his mother, the order of succession was thus fixed: 1st, his children and other descendants were admitted; 2ndly, his brothers and sisters, whether of the whole or the half blood; 3rdly, his ascendants, the father being preferred to his grandfather, and so on.

Secondly, Justinian, as we have seen in the 12th Title of the Second Book (pr.), arranged the order of succession to the *peculium* of a son, placing first the children, then the brothers and sisters, and lastly the father. But in this case the father was not preferred to the grandfather; for the ascendant did not really take in this instance *ab intestato*, but '*jure communi*'; i.e. the claims of the *patria potestas* had been deferred to let in the children and brothers; but if there were no children or brothers, the ascendant, who is at the time the *paterfamilias*, took the *peculium*.

Lastly, the succession of emancipated sons was altered by the constitution of Justinian, which made a fiduciary contract implied in every emancipation. The ancestor thus retained all his rights of succession as patron to the emancipated son, and would properly have succeeded immediately after the *sui heredes;* but Justinian admitted the brothers and sisters before him, and the ascendant who emancipated the son had thus the third place in the order of succession. (C. vi. 56. 2.)

TIT. III. DE SENATUSCONSULTO TERTULLIANO.

Lex duodecim tabularum ita stricto jure utebatur et præponebat masculorum progeniem et eos, qui per feminini sexus necessitudinem sibi junguntur, adeo expellebat, ut ne quidem inter matrem et filium filiamve ultro citroque hereditatis

Such was the rigour of the law of the Twelve Tables, so decided the preference given by it to the issue of males, and the exclusion of those related by the female line, that the right of reciprocal succession was not permitted between a mother and her

capiendæ jus daret, nisi quod prætores ex proximitate cognatorum eas personas ad successionem bonorum possessione unde cognati accommodata vocabant.

children. The prætors, however, admitted such persons, but only in their rank as *cognati*, to the possession of goods called *unde cognati*.

GAI. iii. 24, 25.

Until the *senatusconsultum Tertullianum* (A.D. 158) was made a mother and her children had no right of succession to each other, except that which the prætor gave them as *cognati*. The children were not in the power of the mother, and were, therefore, not her *sui heredes;* they were not in her family, and were, therefore, not her *agnati*. If, indeed, the mother at her marriage passed *in manum viri*, she became, in the eye of the law, the daughter of her husband, and as she was thus of the same family with her children, she and they were *agnati* to each other. But even in the later days of the Republic, a marriage *cum conventione in manum* had probably become comparatively unusual.

1. Sed hæ juris angustiæ postea emendatæ sunt. Et primus quidem divus Claudius matri ad solatium liberorum amissorum legitimam eorum detulit hereditatem.

1. But this strictness of the law was afterwards mitigated. The Emperor Claudius was the first who gave the legal inheritance of deceased children to a mother, to console her grief for their loss.

2. Postea autem senatusconsulto Tertulliano, quod divi Hadriani temporibus factum est, plenissime de tristi successione matri, non etiam aviæ deferenda cautum est: ut mater ingenua trium liberorum jus habens, libertina quattuor ad bona filiorum filiarumve admittatur intestatorum mortuorum, licet in potestate parentis est, ut scilicet, cum alieno juri subjecta est, jussu ejus adeat, cujus juri subjecta est.

2. Afterwards, the *senatusconsultum Tertullianum*, in the reign of the Emperor Hadrian, established the general rule that mothers, but not grandmothers, should have the melancholy privilege of succeeding to their children; so that a mother, born of free parents, having three children, or a freedwoman having four, should be admitted, although in the power of an ascendant, to the goods of her intestate children. Except that a mother in the power of another can only enter upon the inheritance of her children at the command of him to whom she is subject.

D. xxxviii. 17. 2. pr.

This *senatusconsultum* was passed 158 A.D., in the time of Antoninus Pius, who is here called by his name of adoption. It was only an extension of the *lex Papia Poppæa*, which had conferred on free persons having three children, and freed persons having four, many exceptional advantages. Husbands and wives, for example, could, under these circumstances, leave to each other a larger share of their property than was otherwise permitted. (ULP. *Reg.* 15, 16.) This *jus trium liberorum*, as it was termed, was frequently conferred by special favour of the emperors on persons who had not the requisite number of children; and from a constitution of Honorius and Theodosius (C. viii. 59. 1) it appears that the privilege in the later Empire became universal.

3. Præferuntur autem matri liberi defuncti, qui sui sunt quive suorum loco, sive primi gradus sive ulterioris. Sed et filiæ suæ mortuæ filius vel filia opponitur ex constitutionibus matri defunctæ, id est aviæ suæ. Pater quoque utriusque, non etiam avus vel proavus matri anteponitur, scilicet cum inter eos solos de hereditate agitur. Frater autem consanguineus tam filii quam filiæ excludebat matrem : soror autem consanguinea pariter cum matre admittebatur : sed si fuerat frater et soror consanguinei et mater liberis honorata, frater quidem matrem excludebat, communis autem erat hereditas ex æquis partibus fratri et sorori.

3. The children, however, of the deceased son being *sui heredes*, or ranked as such, either in the first or a more remote degree, are preferred to the mother. And if it is a daughter who is dead, her son, or daughter, is preferred by the constitutions to her mother; i.e. to their grandmother. The father of the deceased is preferred to the mother; not so the grandfather or great-grandfather, at least when they and the mother are the only claimants of the inheritance. The brother by the same father, either of a son or a daughter, formerly excluded the mother; but the sister by the same father was admitted equally with the mother. If the deceased left a brother and a sister by the same father as himself, the brother excluded the mother, although rendered capable by the number of her children, and the inheritance was equally divided between the brother and sister.

D. xxxviii. 17. 2. 15, 18, 19; C. vi. 57. 1.

The mother was allowed to rank among the *agnati* by the *senatusconsultum Tertullianum*, butshe had a relative rather than a definitive position, as being in a certain degree of agnation. What her exact position was at different periods of the law will be stated at the end of the Fourth Title.

4. Sed nos constitutione, quam in codice nostro nomine decorato posuimus, matri subveniendum esse existimavimus, respicientes ad naturam et puerperium et periculum et sæpe mortem ex hoc casu matribus illatam. Ideoque impium esse credidimus, casum fortuitum in ejus admitti detrimentum: si enim ingenua ter vel libertina quater non pepererit, immerito defraudabatur successione suorum liberorum; quid enim peccavit, si non plures, sed paucos pepererit? et dedimus jus legitimum plenum matribus sive ingenuis sive libertinis, etsi non ter enixæ fuerint vel quater, sed eum tantum vel eam, qui quæve morte intercepti sunt, ut et sic vocentur in liberorum suorum legitimam successionem.

4. But by a constitution, inserted in the code which bears our name, we have thought fit to come to the aid of the mother, from considering natural reason, as well as the pains of childbirth, the danger, and death itself, which they often suffer. We, therefore, have esteemed it highly unjust that the law should turn to their detriment what is in its nature purely fortuitous; for, if a married woman freeborn does not give birth to three children or a freedwoman to four, they do not therefore deserve to be deprived of the succession to their children. For how can it be imputed to them as a crime to have had few children? We, therefore, have given a full right to every mother, whether freeborn or freed, to be called to the legal succession of her children, although she may not have given birth to three or four children, or may not have had any other than the child whose inheritance is in question.

C. viii. 59. 2.

5. Sed cum antea constitutiones jura legitima perscrutantes partim matrem adjuvabant, partim eam prægravabant et non in solidum eam vocabant, sed in quibusdam casibus tertiam partem ei abstrahentes certis legitimis dabant personis, in aliis autem contrarium faciebant: nobis visum est, recta et simplici via matrem omnibus legitimis personis anteponi et sine ulla deminutione filiorum suorum successionem accipere, excepta fratris et sororis persona, sive consanguinei sint sive sola cognationis jura habentes, ut quemadmodum eam toto alio ordini legitimo præposuimus, ita omnes fratres et sorores, sive legitimi sint sive non, ad capiendas hereditates simul vocemus, ita tamen ut, si quidem solæ sorores cognatæ vel adgnatæ et mater defuncti vel defunctæ supersint, dimidiam quidem mater, alteram vero dimidiam partem omnes sorores habeant, si vero matre superstite et fratre vel fratribus solis vel etiam cum sororibus sive legitima sive sola cognationis jura habentibus, intestatus quis vel intestata moriatur, in capita distribuatur ejus hereditas.

5. The constitutions of former emperors, relative to the right of succession, were partly favourable to mothers, and partly unfavourable. They did not always give the mothers the entire inheritance of their children, but in some cases deprived them of a third, which was given to certain *agnati*, and in other cases, doing just the contrary, gave a third. But it seems right to us that mothers should receive the succession of their children without any diminution, and that they should be decidedly and exclusively preferred before all legal heirs, except the brothers and sisters of the deceased, whether by the same father or having only the rights of cognation. And as we have preferred the mother to all other legal heirs, we call all brothers and sisters, legal or not, to the inheritance together with the mother, the following rule being observed. If there are living only sisters *agnatæ* or *cognatæ*, and the mother of the deceased, the mother shall have one half of the goods, and the sisters the other half. But if there are living the mother, and also a brother or brothers only, or brothers and also sisters, whether having agnatic rights, or only having the rights of *cognati*, then the inheritance of the intestate son or daughter shall be divided *in capita*.

C. vi. 56. 7.

In the code of Theodosius (v. 1. 1), we find two constitutions, one of Constantine, the other of Valentinian and Valens, which made the first change in the *jus liberorum* introduced by the *lex Papia Poppœa*. By these constitutions it was enacted that if there were persons in a certain degree of agnation with the deceased, namely, a paternal uncle, or a paternal uncle's son or grandson, or an emancipated brother, then the mother, instead of excluding them, as, if she had the *jus liberorum*, she would have done, divided the inheritance with them, taking two-thirds if she had the *jus trium liberorum*, and one-third if she had not. This enactment was, therefore, a gain to those who had not the *jus liberorum*, and a loss to those who had. Justinian did away altogether with the *jus liberorum* and the distinctions founded upon it.

6. Sed quemadmodum nos matribus prospeximus, ita eas oportet suæ suboli consulere: scituris eis, quod, si tutores liberis non petierint vel in locum remoti vel excusati intra annum petere neglexerint, ab eorum

6. And as we have thus taken care of the interests of the mothers, they ought in return to consult the welfare of their children. Let them know, then, that if they do not demand a tutor for their children, or neglect to

impuberum morientium successione merito repellentur.

ask within a year for the appointment of a new tutor in the place of one who has been removed or excused, they will be deservedly excluded from the succession of their children who may die before the age of puberty.

D. xxxviii. 17. 2. 43.

7. Licet autem vulgo quæsitus sit filius filiave, potest ad bona ejus mater ex Tertulliano senatusconsulto admitti.

7. Although a son or a daughter is born of an uncertain father, yet the mother may be admitted to succeed to their goods by the *senatusconsultum Tertullianum*.

D. xxxviii. 17. 2. 1.

The natural tie is all that is regarded in this case; this is equally strong between the mother and child, whoever may be the father.

Tit. IV. DE SENATUSCONSULTO ORPHITIANO.

Per contrarium autem ut liberi ad bona matrum intestatarum admittantur, senatusconsulto Orphitiano effectum est, quod latum est Orphito et Rufo consulibus, divi Marci temporibus. Et data est tam filio quam filiæ legitima hereditas, etiamsi alieno juri subjecti sunt: et præferuntur et consanguineis et adgnatis defunctæ matris.

Reciprocally children are admitted to the goods of their intestate mothers by the *senatusconsultum Orphitianum*, made in the consulship of Orphitus and Rufus, in the reign of the Emperor Marcus. By this *senatusconsultum* the legal inheritance is given both to the sons and daughters, although in the power of another, and they are preferred to the *consanguinei* and to the *agnati* of their deceased mother.

D. xxxviii. 17. 9; C. vi. 57. 1.

The *senatusconsultum Orphitianum* was made A.D. 178, in the time of Marcus Aurelius and Commodus. Previously, children could not succeed to their mother, except as *cognati*. But by this *senatusconsultum* they were preferred to the *consanguinei*, that is, the brothers and sisters, natural or adoptive, as well as to all other *agnati*.

1. Sed cum ex hoc senatusconsulto nepotes ad aviæ successionem legitimo jure non vocabantur, postea hoc constitutionibus principalibus emendatum est, ut ad similitudinem filiorum filiarumque et nepotes et neptes vocentur.

1. But since grandsons and granddaughters were not called by this *senatusconsultum* to the legal succession of their grandmother, the omission was afterwards supplied by the imperial constitutions, so that grandsons and granddaughters are now called to inherit, just as sons and daughters are.

C. vi. 55. 9.

The constitution enacting this given in the code is one of Valentinian, Theodosius, and Arcadius.

2. Sciendum autem est, hujusmodi successiones, quæ a Tertulliano

2. It must be observed that these successions, derived from the *senatus-*

et Orphitiano deferuntur, capitis deminutione non peremi propter illam regulam, qua novæ hereditates legitimæ capitis deminutione non pereunt, sed illæ solæ, quæ ex lege duodecim tabularum deferentur.

consulta Tertullianum and *Orphitianum*, are not lost by a *capitis deminutio*. The rule is, that legal inheritances given by the later law are not destroyed by *capitis deminutio*, which affects those only that are given by the law of the Twelve Tables.

D. xxxviii. 17. 1. 8.

It is only the *minima capitis deminutio* which is here spoken of. Any one who sustained the *maxima* or *media deminutio*, as he ceased to be a citizen, ceased to have any rights of succession.

3. Novissime sciendum est, etiam illos liberos, qui vulgo quæsiti sunt, ad matris hereditatem ex hoc senatusconsulto admitti.

3. Lastly, it must be observed, that even children born of an uncertain father are admitted by the *senatusconsultum Orphitianum* to the inheritance of their mother.

D. xxxviii. 17. 1. 2.

Justinian afterwards altered this, so as to exclude such children from taking anything, whether by will, or on intestacy, or by gift *inter vivos* from their mother, if she was of high rank (*illustris*), or if she had other children born in lawful marriage. (C. vi. 57. 5.)

4. Si ex pluribus legitimis heredibus quidam omiserint hereditatem vel morte vel alia causa impediti fuerint, quominus adeant: reliquis, qui adierint, adcrescit illorum portio et, licet ante decesserint, qui adierint, ad heredes tamen eorum pertinet.

4. When there are many legal heirs, and some renounce the inheritance, or are prevented by death, or any other cause, from accepting it, then the portions of such persons accrue to those who accept the inheritance; and if any of those who accept happen to die beforehand, the portions accruing to them will go to their heirs.

D. xxxviii. 16. 9.

This paragraph has nothing to do with the *senatusconsultum Orphitianum*. It refers to the right of accrual enjoyed by all *heredes legitimi*. If any of those called to share an inheritance did not take his share, it was divided among all those who entered on the inheritance; and, if any of those who had entered died before receiving the share that accrued to him, this accruing share passed to his heirs, his interest in it having become fixed, and made transmissible to his heirs, by his entering on the inheritance.

The following were the principal changes in the law of the succession of the *agnati*. By the law of the Twelve Tables, *agnati*, i.e. collaterals in the same civil family, succeeded in default of *sui heredes*. Subsequently, different classes of persons were allowed to rank as *agnati* who were not so. 1. Emancipated brothers and sisters were allowed to rank as *agnati* by Anastasius, and their children were allowed to do so by Justinian. 2. Under Justinian, a peculiar order of succession was fixed on for persons emancipated; first came their children; secondly, their brothers and sisters;

thirdly, the ascendant emancipator. 3. Justinian placed uterine brothers and sisters and their children on the same footing as *consanguinei* and their children. 4. The mother was allowed to succeed to her children by the *senatusconsultum Tertullianum*, and children to their mother by the *senatusconsultum Orphitianum*. As the position of the mother is a subject of some complexity, it is treated separately below. 5. Grandchildren succeeded to their grandmother by a constitution of Valentinian, Theodosius, and Arcadius (par. 1).

There were also two other points, besides the admission of these persons excluded by the strict definition of *agnati*, in which the law underwent alterations. First the Twelve Tables made no distinction of sex in the *agnati;* the *prudentes* limited the succession of females to the second degree. Justinian restored the law of the Twelve Tables on this point, and permitted no distinction of sex. (Tit. 2. 3.) Secondly, under the law of the Twelve Tables, there was no devolution among the *agnati;* if the nearest refused, the more remote could not come in their place; Justinian permitted such a devolution to take place. (Tit. 2. 7.)

To have a place in the succession under the *senatusconsultum Tertullianum*, the mother must have the *jus liberorum*, the privileges accorded to free persons having three or freed persons having four children, and she had not a definite place, but one varying according as there were or were not other persons to preclude or share her claim. The chief provisions of the law on this head may be stated as follows.

We will first consider the position of the mother, having the *jus liberorum*, when the father is dead. 1. If her son died leaving children, his children, if in his family, would succeed as *sui heredes*. But these children might be in an adoptive family, and so have no claim, previously to Justinian's legislation, to the inheritance of their natural father. If there were *agnati* of the deceased, then the conflict was between the mother and these *agnati*, and the mother excluded the adopted children. If there were no *agnati*, then the conflict was between the mother and the adopted children as *cognati*, and the children excluded the mother. (D. xxxviii. 17. 2. 9.) If her daughter died leaving children, they excluded her under the imperial legislation. (Tit. 3. 3. and C. vi. 57. 1.) 2. If her son or daughter died childless and without brothers or sisters living, the mother took. If there was a brother of the deceased, he excluded the mother and shared with the sisters, if any. If there were no brothers, but there were sisters, the mother shared with them. (Tit. 3. 3.) Until we get to the legislation of Justinian, it is only of brothers and sisters by the same father, *consanguinei, -æ*, that we are speaking. 3. Under the later emperors, previously to Justinian, the position of the mother with regard to a paternal uncle, or a paternal uncle's son or grandson, or an emancipated brother of the deceased, was as follows: If the mother had not the *jus liberorum*, she was no longer

excluded by such *agnati*, but took one-third of the inheritance. If she had the *jus liberorum*, she no longer excluded them altogether, but only took two-thirds. (Tit. 3. 5.)

Secondly, we will take the case of the father as well as the mother having the *jus liberorum* being alive. The father took, if in the same family with the deceased child. But (1) the father might have been emancipated or given in adoption, and the deceased child not. Here, if there were *agnati* of the deceased, the father was excluded, and also the mother if there was a brother of the deceased among the *agnati;* if there was no brother, she shared with sisters, and excluded remoter *agnati*. If there were no *agnati*, or if the sisters disclaimed, then the conflict was between the father as one of the *cognati* and the mother, and then the father excluded the mother. (D. xxxviii. 17. 2. 17, 18.) (2) The deceased might have been emancipated, and then the father excluded the mother. There might, however, be living the father's father. He, if the father was alive, being preferred to the father, was also preferred to the mother. (D. xxxviii. 17. 5. 2.) The conflict was here not between the mother and the grandfather directly, but between the mother and the grandfather claiming through the father. But if the father was dead, then the conflict was directly between the mother and the grandfather (*inter eos solos agitur*, Tit. 3. 3), and the mother was preferred.

Justinian made the following changes affecting the position of the mother. 1. He entirely did away with the *jus liberorum*, and put all mothers on an equality. (Tit. 3. 5.) 2. He put emancipated and uterine brothers and sisters and their children on a level with *consanguinei, -æ*, and they therefore had to be taken into account when the mother's position had to be determined with regard to the brothers and sisters of the deceased.

Some other minor points as to the succession of mothers and children are worth noticing. (1) The rule as to there being no devolution among *agnati* did not apply to the mother. If the *agnati* who preceded her refused, she took; if she refused, the *agnati* whom she preceded took. (D. xxxviii. 17. 2. 9, 14, 20.) (2) The *minima capitis deminutio* did not interfere with successions under the *senatusconsultum Tertullianum* or *Orphitianum* (Tit. 4. 2); and (3) children born of an uncertain father inherited from their mother under the *senatusconsultum Orphitianum* (Tit. 4. 3), and their mother from them under the *senatusconsultum Tertullianum.* (Tit. 3. 7.) (4) Mothers were excluded from succeeding to their children dying under the age of puberty, if they had not provided them with tutors. (Tit. 3. 6.)

TIT. V. DE SUCCESSIONE COGNATORUM.

Post suos heredes eosque, quos inter suos heredes prætor et constitutiones vocant, et post legitimos

After the *sui heredes* and those whom the prætor and the constitutions call to inherit among the *sui*

(quo numero sunt adgnati et hi, quos in locum adgnatorum tam supra dicta senatusconsulta quam nostra erexit constitutio) proximos cognatos prætor vocat.

heredes, and after the legal heirs, that is, the *agnati* and those whom the above-mentioned *senatusconsulta* and our constitution have placed among the *agnati*, the prætor calls the nearest *cognati*.

D. xxxviii. 15. 1; D. xxxviii. 7. 2. 4.

The law of the Twelve Tables recognised only the succession of (1) *sui heredes;* (2) *agnati;* (3) *gentiles*. If there were no *gentiles*, the inheritance lapsed to the state. In plebeian families, or rather in such plebeian families as were not parts of a plebeian *gens*, if there were no *agnati*, the inheritance would lapse at once.

The subject of *gentilitas* is too obscure, and repays investigation too little, to permit us to enter into it here. Probably the original notion of *gentiles* was that of members of some pure uncorrupted patrician stock, though not necessarily of the same descent, but bearing the same name, and having the same *sacra*. (See Introd. sec. 2.) Probably, also, freedmen and clients of *gentiles* were, in some degree, considered as themselves *gentiles;* probably if their property was not claimed by their patron, it went to the members of his *gens*, but they had not any claim on the property of any other *gentilis*. We know also that there were plebeian *gentes*, formed probably by the marriage of a patrician with a plebeian before the *plebs* received the *connubium*. Members of plebeian *gentes* would, we may suppose, have the rights of *gentilitas* towards other members of the same plebeian *gens*, and it would seem that they had them towards the members of the patrician *gens*, from which they were an offset. (Cic. *de Orat.* i. 39.) Of the mode in which the *gentiles* took the inheritance, we know nothing, nor at how late a period of history the *gentes* were still really in existence. Gaius (iii. 17) treats the subject as one of mere antiquarian interest. Probably at the time of the prætor's legislation there were few families that could boast a descent so pure and accurately known as to satisfy the requisites of *gentilitas*. At any rate, the prætors felt themselves at liberty to favour, in every way, the tie of blood, and they accordingly called the *cognati* to the succession. (See further, Ortolan, iii. 30 *et seq.;* Hunter, 657.)

1. Qua parte naturalis cognatio spectatur. Nam adgnati capite deminuti quique ex his progeniti sunt, ex lege duodecim tabularum inter legitimos non habentur, sed a prætore tertio ordine vocantur, exceptis solis tantummodo fratre et sorore emancipatis, non etiam liberis eorum, quos lex Anastasiana cum fratribus integri juris constitutis vocat quidem ad legitimam fratris hereditatem sive sororis, non æquis tamen partibus, sed cum aliqua deminu-

1. It is the natural relationship that is here looked to; thus *agnati* who have undergone a *capitis deminutio* and their descendants are not included among the legal heirs by the law of the Twelve Tables, but they are called by the prætor in the third order. We must except an emancipated brother or sister, but not their children. For the *lex Anastasiana* calls an emancipated brother or sister, together with brothers whose rights still exist unaltered, to the legal succession of

tione, quam facile est ex ipsius constitutionis verbis colligere, aliis vero adgnatis inferioris gradus, licet capitis deminutionem passi non sunt, tamen eos anteponit et procul dubio cognatis.

their brother or sister (not, indeed, giving them an equal share, but making a deduction set forth in the constitution), and prefers them to all *agnati* of an inferior degree, even though these *agnati* have undergone no *capitis deminutio*, and, of course, prefers them to all *cognati.*

GAI. iii. 21, 27 ; C. v. 30. 4.

We have already spoken of this *lex Anastasiana* in the note to Tit. 2. 4, and noticed the constitution of A.D. 534, by which Justinian admitted as *agnati* the children of emancipated brothers and sisters, and did away with the deduction mentioned in the text, namely, that of one-fourth.

2. Hos etiam, qui per feminini sexus personas ex transverso cognatione junguntur, tertio gradu proximitatis nomine prætor ad successionem vocat.

2. Collateral relations united only by the female line are also called by the prætor in the third order of succession, by title of their proximity.

GAI. iii. 30.

3. Liberi quoque, qui in adoptiva familia sunt, ad naturalium parentum hereditatem hoc eodem gradu vocantur.

3. Children, who are in an adoptive family, are likewise called in the third order of succession to the inheritance of their natural parents.

GAI. iii. 31.

Justinian's change in the law of adoption left the adoptive child, unless adopted by an ascendant, in his natural family, and, therefore, he could come in as a *suus heres*, or *agnatus*, and not merely as a *cognatus*. But the text would still be applicable to persons adopted by an ascendant and to persons *sui juris*, who arrogated themselves.

4. Vulgo quæsitos nullum habere adgnatum, manifestum est, cum adgnatio a patre, cognatio sit a matre, hi autem nullum patrem habere intelleguntur. Eadem ratione nec inter se quidem possunt videri consanguinei esse, quia consanguinitatis jus species est adgnationis: tantum igitur cognati sunt sibi, sicut et matris cognatis. Itaque omnibus istis ea parte competit bonorum possessio, qua proximitatis nomine cognat ivocantur.

4. It is manifest that children born of an uncertain father have no *agnati*, inasmuch as agnation proceeds from the father, cognation from the mother, and such children are looked upon as having no father. And, for the same reason, consanguinity cannot be said to subsist between these children, because consanguinity is a species of agnation. They can, therefore, only be related to each other as *cognati* by being so related by their mother; and it is for this reason that all such children are admitted to the possession of goods by that part of the edict which calls the *cognati* by title of their proximity.

D. xxxviii. 8. 2, 4.

5. Hoc loco et illud necessario admonendi sumus, adgnationis quidem jure admitti aliquem ad hereditatem

5. Here we may observe, that by right of agnation any one may be admitted to inherit, although in the tenth

et si decimo gradu sit, sive de lege duodecim tabularum quæramus, sive de edicto, quo prætor legitimis heredibus daturum se bonorum possessionem pollicetur. Proximitatis vero nomine his solis prætor promittit bonorum possessionem, qui usque ad sextum gradum cognationis sunt, et ex septimo a sobrino sobrinaque nato natæve.

degree, both by the law of the Twelve Tables, and by the edict in which the prætor promises that he will give the possession of goods to the legal heirs. But the prætor promises the possession of goods to *cognati* by title of their proximity only as far as the sixth degree of cognation, and in the seventh degree to those *cognati* who are the children of a second cousin.

D. xxxviii. 16. 2. 1; D. xxxviii. 8. 1. 3; D. xxxviii. 8. 9. pr.

The *agnati* were not limited by the tenth degree. (See Tit. 6. 12.) This degree is only given as an instance of how far the succession might go. But the sixth degree was the limit, with the exception given in the text, of the succession of *cognati*.

Tit. VI. DE GRADIBUS COGNATIONIS.

Hoc loco necessarium est exponere, quemadmodum gradus cognationis numerentur. Qua in re inprimis admonendi sumus, cognationem aliam supra numerari, aliam infra, aliam ex transverso, quæ etiam ex latere dicitur. Superior cognatio est parentum, inferior liberorum, ex transverso fratrum sororumve eorumque, qui ex his progenerantur, et convenienter patrui, amitæ, avunculi, materteræ. Et superior quidem et inferior cognatio a primo gradu incipit: at ea, quæ ex transverso numeratur, a secundo.

It is now necessary to explain how the degrees of cognation are computed; and first we must observe, that one cognation is reckoned by ascending, a second by descending, and a third by going transversely, or, as it is also called, collaterally. The cognation reckoned by ascending is that of ascendants; that reckoned by descending is that of descendants; that reckoned transversely is that of brothers and sisters, and their issue, and consequently that of uncles and aunts, whether paternal or maternal. In the ascending and descending cognation the nearest *cognatus* is in the first degree; in the transverse, the nearest is in the second.

D. xxxviii. 10. 1. pr. and 1.

1. Primo gradu est supra pater, mater, infra filius, filia.

1. In the first degree are, ascending, a father or a mother; descending, a son or a daughter.

D. xxxviii. 10. 1. 3.

2. Secundo supra avus, avia, infra nepos, neptis, ex transverso frater, soror.

2. In the second degree are, ascending, a grandfather or a grandmother; descending, a grandson or granddaughter; in the collateral line, a brother or a sister.

D. xxxviii. 10. 1. 4.

3. Tertio supra proavus, proavia, infra pronepos, proneptis, ex transverso fratris sororisque filius, filia et convenienter patruus, amita, avunculus, matertera. Patruus est patris

3. In the third degree are, ascending, a great-grandfather or a great-grandmother; descending, a great-grandson or great-granddaughter; in the collateral line, the son or

frater, qui Græce πάτρως vocatur; avunculus est matris frater, qui apud Græcos proprie μήτρως appellatur: et promiscue θεῖος dicitur. Amita est patris soror, matertera vero matris soror: utraque θεία vel apud quosdam τηθίς appellatur.

daughter of a brother or sister; and so accordingly is an uncle or an aunt, whether paternal or maternal. *Patruus* is a father's brother, called in Greek πάτρως; *avunculus* is a mother's brother, in Greek μήτρως; θεῖος is applied indifferently to either; *amita* is a father's sister, *matertera* a mother's sister, and each is called in Greek θεία indifferently, and sometimes τηθίς.

D. xxxviii. 10. 1. 5; D. xxxviii. 10. 10. 14.

4. Quarto gradu supra abavus, abavia, infra abnepos, abneptis, ex transverso fratris sororisque nepos, neptis et convenienter patruus magnus, amita magna (id est avi frater et soror), item avunculus magnus, matertera magna (id est aviæ frater et soror), consobrinus, consobrina (id est qui quæve ex fratribus aut sororibus progenerantur). Sed quidam recte consobrinos eos proprie putant dici, qui ex duabus sororibus progenerantur, quasi consororinos: eos vero qui ex duobus fratribus progenerantur, proprie fratres patrueles vocari (si autem ex duobus fratribus filiæ nascantur, sorores patrueles appellantur): at eos, qui ex fratre et sorore propagantur, amitinos proprie dici (amitæ tuæ filii consobrinum te appellant, tu illos amitinos).

4. In the fourth degree are, ascending, a great-great-grandfather, or a great-great-grandmother; descending, a great-great-grandson, or a great-great-granddaughter; in the collateral line, the grandson or the granddaughter of a brother or a sister; as also a great-uncle or great-aunt, paternal, that is, the brother or sister of a grandfather; or maternal, that is, the brother or sister of a grandmother; and first cousins (*consobrinus, -a*), that is, the children of brothers or sisters; but to speak strictly, according to some, it is the children of sisters that are properly called *consobrini*, as if *consororini*; the children of brothers are properly *fratres patrueles*, if males; *sorores patrueles*, if females; the children of a brother and of a sister are properly *amitini*; the children of your *amita* (aunt by the father's side) call you *consobrinus*, and you call them *amitini*.

D. xxxvii. 10. 1. 6.

5. Quinto supra atavus, atavia, infra adnepos, adneptis, ex transverso fratris sororisque pronepos, proneptis et convenienter propatruus, proamita (id est proavi frater et soror), proavunculus, promatertera (id est proaviæ frater et soror), item fratris patruelis, sororis patruelis, consobrini et consobrinæ, amitini, amitinæ filius, filia, propius sobrino, sobrina (hi sunt patrui magni, amitæ magnæ, avunculi magni, materteræ magnæ filius, filia).

5. In the fifth degree are, ascending, a great-grandfather's grandfather, or a great-grandfather's grandmother; descending, a great-grandson or a great-granddaughter of a grandson or granddaughter; in the collateral line, a great-grandson or great-granddaughter of a brother or sister, as also a great-grandfather's brother or sister, or a great-grandmother's brother or sister; also, the son or daughter of a first cousin, that is, of a *frater* or *soror patruelis*, of a *consobrinus* or *consobrina*, or of an *amitinus* or *amitina*; also cousins who precede by a degree second cousins, that is, the son or daughter of a great-uncle or great-aunt, paternal or maternal.

D. xxxviii. 10. 1. 7.

Propior sobrino is, to use the exact equivalent, a first cousin once removed. He is one degree nearer (*propius*) than a *sobrinus* or second cousin.

6. Sexto gradu sunt supra tritavus, tritavia, infra trinepos, trineptis, ex transverso fratris sororisque abnepos, abneptis et convenienter abpatruus, abamita (id est abavi frater et soror), abavunculus, abmatertera (id est abaviæ frater et soror), item sobrini sobrinæque (id est qui quæve ex fratribus vel sororibus patruelibus vel consobrinis vel amitinis progenerantur).

6. In the sixth degree are, ascending, a great-grandfather's great-grandfather, or a great-grandfather's great-grandmother; descending, the great-grandson or great-granddaughter of a great-grandson or a great-granddaughter; in the collateral line, a great-great-grandson or a great-great-granddaughter of a brother or sister; as also, a great-great-grandfather's brother or sister, and a great-great-grandmother's brother or sister; also, second cousins, that is, the sons and daughters of first cousins in general, whether the first cousins are sprung from two brothers or two sisters, or a brother and a sister.

D. xxxviii. 10. 3.

The list of the persons belonging to the sixth degree here given is not complete, as will be seen by looking at the accompanying table. To make the list complete we should have to insert, as Huschke inserts in the text after *abaviæ frater et soror*, the following words:—'Item propatrui, proamitæ, proavunculi, promaterteræ filius, filia, item fratris patruelis, sororis patruelis, consobrini, consobrinæ, amitini, amitinæ nepos, neptis'.

7. Hactenus ostendisse sufficiet, quemadmodum gradus cognationis numerentur. Namque ex his palam est intellegere, quemadmodum ulterius quoque gradus numerare debemus, quippe semper generata quæque persona gradum adiciat, ut longe facilius sit respondere quoto quisque gradu sit, quam propria cognationis appellatione quemquam denotare.

7. It is sufficient to have shown thus far how degrees of cognation are reckoned; and from the examples given the more remote degrees may be computed; for each generation always adds one degree; so that it is much easier to express in what degree any person is related to another than to denote such person by his proper term of cognation.

D. xxxviii. 10. 10. 9.

8. Adgnationis quoque gradus eodem modo numerantur.

9. Sed cum magis veritas oculata fide quam per aures animis hominum infigitur, ideo necessarium duximus, post narrationem graduum etiam eos præsenti libro inscribi, quatenus possint et auribus et inspectione adulescentes perfectissimam graduum doctrinam adipisci.

8. The degrees of agnation are reckoned in the same manner.

9. But as truth is fixed in the mind much better by the eye than by the ear, we have thought it necessary to subjoin, to the account given of the degrees, a table of them, that the young student, both by hearing and by seeing, may gain a perfect knowledge of them.

This table is given in the opposite page.

					VI. Trit-avus.	VI. Trit-avia.					
				VI. Abpatruus, abamita.	V. Atavus.	V. Atavia.	VI. Abavunculus, abmatertera.				
			VI. Propatrui, proamitæ filius, filia.	V. Propatruus, proamita.	IV. Abavus.	IV. Abavia.	V. Proavunculus, promatertera.	VI. Proavunculi, promaterteræ filius, filia.			
		VI. Sobrinus, sobrina.	V. Propior sobrinus, sobrina.	IV. Patruus magnus, amita magna.	III. Proavus.	III. Proavia.	IV. Avunculus magnus, matertera magna.	V. Propior sobrinus, sobrina.	VI. Sobrinus, sobrina.		
	VI. Fratris et sororis patruelis, amitini, amitinæ nepos, neptis.	V. Fratris et sororis patruelis, amitini, amitinæ filius, filia.	IV. Fratres et sorores patrueles, amitinus, amitina.	III. Patruus, amita.	II. Avus.	II. Avia.	III. Avunculus, matertera.	IV. Frater consobrinus, soror consobrina.	V. Fratris consobrini, sororis consobrinæ filius, filia.	VI. Fratris consobrini, sororis consobrinæ nepos, neptis.	
VI. Fratris abnepos, abneptis.	V. Fratris pronepos, proneptis.	IV. Fratris nepos, neptis.	III. Fratris filius, filia.	II. Frater.	I. Pater.	I. Mater.	II. Soror.	III. Sororis filius, filia.	IV. Sororis nepos, neptis.	V. Sororis pronepos, proneptis.	VI. Sororis abnepos, abneptis.
					I. Filius.	I. Filia.					
					II. Nepos.	II. Neptis.					
					III. Pronepos.	III. Proneptis.					
					IV. Abnepos.	IV. Abneptis.					
					V. Adnepos.	V. Adneptis.					
					VI. Trinepos.	VI. Trineptis.					

10. Illud certum est, ad serviles cognationes illam partem edicti, qua proximitatis nomine bonorum possessio promittitur, non pertinere: nam nec ulla antiqua lege talis cognatio computabatur. Sed nostra constitutione, quam pro jure patronatus fecimus (quod jus usque ad nostra tempora satis obscurum atque nube plenum et undique confusum fuerat), et hoc, humanitate suggerente, concessimus, ut si quis in servili consortio constitutus liberum vel liberos habuerit sive ex libera sive servilis condicionis muliere, vel contra serva mulier ex libero vel servo habuerit liberos cujuscumque sexus, et ad libertatem his pervenientibus et hi, qui ex servili ventre nati sunt, libertatem meruerunt, vel dum mulieres liberæ erant, ipsi in servitute eas habuerunt et postea ad libertatem pervenerunt, ut hi omnes ad successionem vel patris vel matris veniant, patronatus jure in hac parte sopito: hos enim liberos non solum in suorum parentum successionem, sed etiam alterum in alterius mutuam successionem vocavimus, ex illa lege specialiter eos vocantes, sive soli inveniantur, qui in servitute nati et postea manumissi sunt, sive una cum aliis, qui post libertatem parentum concepti sunt, sive ex eadem matre vel eodem patre sive ex aliis nuptiis, ad similitudinem eorum, qui ex justis nuptiis procreati sunt.

10. It is certain that the part of the edict in which the possession of goods is promised by title of proximity, does not apply to servile cognation, which was not recognised by any ancient law. But, by our constitution concerning the right of patronage, a right hitherto so obscure, so cloudy and confused, we have enacted, from a feeling of humanity, that if a male slave lives with, and has children by, a woman either free or a slave, or conversely, if a female slave has a child or children of either sex by a freeman or a slave, then if those of the parents who are not free are enfranchised, and the children, whose mother was a slave, are also made free; or if the mothers were originally free, but the fathers had lived with them after they had been reduced to a servile condition and afterwards both parents had been made free:—then in these cases, the children shall all succeed to their father or mother, the right of patronage as to this portion of it lying dormant. For we have called these children to succeed not only to their parents, but also mutually to each other, and that whether they have all been born in servitude and afterwards enfranchised, or whether they succeed with others who were conceived after the enfranchisement of their parents; and also whether they have all the same father and mother, or have a different father or mother, exactly as would be the case with the issue of parents legally married.

D. xxxviii. 8. 1. 2; C. vi. 4. 4.

The text here is very obscure. It is, perhaps, obvious that the children are to succeed to both their parents, and to inherit from each other without interference from the rights of patronage in the following cases:—(1) When the father and mother are slaves and they and the children have been enfranchised. (2) When the father is a slave and the mother a freewoman, and the father has been enfranchised. (3) When the father is a freeman, the mother a slave, and the mother and children have been enfranchised. But the text goes on to contemplate a further case in the words *vel dum mulieres liberæ erant ipsi in servitute eas habuerunt.* The ordinary reading is *eos*, and then *ipsi* may probably be taken of their masters: but this is exactly the first of the above-mentioned cases over again, and has been stated in the words *si quis in servili consortio constitutus liberum vel liberos habuerit ex libera muliere.* Huschke reads *eas*, and suggests that the passage may refer to women who, under the *senatusconsultum Claudianum*

(Tit. 12. 1), had been made the slaves of the masters of the fathers, and thus the fourth case would be that of children who were the issue of a slave by a mother originally free, but reduced to the position of a slave, and whose parents had been subsequently manumitted. This suggestion has the advantage of making out a fourth case, and is perhaps therefore to be adopted; but some violence has to be put on the Latin to carry it out, and it must be remembered that the *senatusconsultum Claudianum* was abrogated by Justinian.

11. Repetitis itaque omnibus, quæ jam tradidimus, apparet, non semper eos, qui parem gradum cognationis optinent, pariter vocari, eoque amplius nec eum quidem, qui proximior sit cognatus, semper potiorem esse. Cum enim prima causa sit suorum heredum quosque inter suos heredes jam enumeravimus, apparet, pronepotem vel abnepotem defuncti potiorem esse quam fratrem aut patrem matremque defuncti, cum alioquin pater quidem et mater, ut supra quoque tradidimus, primum gradum cognationis optineant, frater vero secundum, pronepos autem tertio gradu sit cognatus et abnepos quarto: nec interest, in potestate morientis fuerit an non fuerit, quod vel emancipatus vel ex emancipato aut ex feminino sexu propagatus est.

11. To recapitulate what we have said on this subject, it appears that those who are in the same degree of cognation are not always called equally to the succession; and further, that even the nearer in degree of cognation is not always preferred. For, as the first place is given to *sui heredes*, and to those who are numbered with them, it is evident that the great-grandson or great-great-grandson is preferred to the brother or even the father or mother of the deceased, although a father and mother (as we have before observed) are in the first degree of cognation, a brother in the second, a great-grandson in the third, and a great-great-grandson in the fourth; neither does it make any difference whether the descendants were under the power of the deceased at the time of his death, or out of his power, either by being themselves emancipated, or by being the children of those who were so, nor whether they were descended by the female line.

D. xxxviii. 10. 1. 2.

12. Amotis quoque suis heredibus quosque inter suos heredes vocari diximus, adgnatus, qui integrum jus adgnationis habet, etiamsi longissimo gradu sit, plerumque potior habetur quam proximior cognatus: nam patrui nepos vel pronepos avunculo vel materteræ præfertur. Totiens igitur dicimus aut potiorem haberi eum, qui proximiorem gradum cognationis optinet, aut pariter vocari eos, qui cognati sint, quotiens neque suorum heredum jure quique inter suos heredes sunt, neque adgnationis jure aliquis præferri debeat secundum ea, quæ tradidimus, exceptis fratre et sorore emancipatis, qui ad successionem fratrum vel sororum vocantur, qui et si capite deminuti sunt, tamen præferuntur ceteris ulterioris gradus adgnatis.

12. But, when there are no *sui heredes*, nor any of those who are called with them, then an *agnatus* who has retained his full rights, although he be in the most distant degree, is generally preferred to a *cognatus* in a nearer degree; thus the grandson or great-grandson of a paternal uncle is preferred to a maternal uncle or aunt. Thus, when we say that the nearest in degree of cognation is called to the succession, or, if there be many in the same degree, that they are all called equally, it is subject to there being no *sui heredes*, nor any of those who are called with them, nor any one who ought to be preferred by right of *agnatio*, according to the principles we have laid down. And we must notice the exception made in the case of an emancipated brother and

sister who are called to the succession of their brothers and sisters; for, although they have suffered a *capitis deminutio*, they are nevertheless preferred to all *agnati* of a more remote degree.

GAI. iii. 27, 29; C. v. 30. 4.

TIT. VII. DE SUCCESSIONE LIBERTORUM.

Nunc de libertorum bonis videamus. Olim itaque licebat liberto patronum suum impune testamento præterire: nam ita demum lex duodecim tabularum ad hereditatem liberti vocabat patronum, si intestatus mortuus esset libertus, nullo suo herede relicto. Itaque intestato quoque mortuo liberto, si is suum heredem reliquisset, nihil in bonis ejus patrono juris erat. Et si quidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla videbatur querela: si vero adoptivus filius esset, aperte iniquum erat, nihil juris patrono superesse.

We will now speak of succession to freedmen. A freedman might formerly, with impunity, omit in his testament any mention of his patron, for the law of the Twelve Tables called the patron to the inheritance only when the freedman died intestate without leaving any *suus heres*. Therefore, though he had died intestate, yet if he had left a *suus heres*, the patron had no claim upon his estate. And, certainly, when the *suus heres* was a natural child of the deceased, the patron had no cause of complaint; but when the *suus heres* was only an adopted son, it was manifestly unjust that the patron should have no claim.

GAI. iii. 39, 40.

The law of the Twelve Tables regulated the succession to enfranchised slaves as follows: an enfranchised slave had no *agnati*, for he belonged to no civil family; but he might marry and found a family of his own, and then his children would be his *sui heredes*, or he might gain *sui heredes* by adoption. If he died intestate, his *sui heredes* succeeded to him; and in default of *sui heredes*, the patron, or, if the patron was dead, the children of the patron, took the place of *agnati*, and received the inheritance *in capita*, as *agnati* did. The enfranchised slave had, however, full power to make a testament, and might pass over both his own *sui heredes* and his patron. A female slave, however, if emancipated, could not exclude the patron from her inheritance; for she could have no *sui heredes*, being a woman; and as she was always, on account of her sex, considered under the *tutela* of her patron, she was incapable of making a testament, unless with the consent of her patron. (ULP. *Reg*. 29. 2; GAI. iii. 43.)

1. Qua de causa postea prætoris edicto hæc juris iniquitas emendata est. Sive enim faciebat testamentum libertus, jubebatur ita testari, ut patrono partem dimidiam bonorum suorum relinqueret: et si aut nihil aut minus partis dimidiæ reliquerat, dabatur patrono contra tabulas testamenti partis dimidiæ

1. This unfairness in the law was therefore afterwards amended by the edict of the prætor. Every freedman who made a testament was commanded to make such a disposition of his property as to leave one half to his patron; and, if the testator left him nothing, or less than a half, then the possession of half was given to the patron *contra*

bonorum possessio. Si vero intestatus moriebatur, suo herede relicto filio adoptivo, dabatur æque patrono contra hunc suum heredem partis dimidiæ bonorum possessio. Prodesse autem liberto solebant ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habebat, sed etiam emancipati et in adoptionem dati, si modo ex aliqua parte heredes scripti erant aut præteriti contra tabulas bonorum possessionem ex edicto petierant: nam exheredati nullo modo repellebant patronum.

tabulas. And if a freedman died intestate, leaving an adopted son as his *suus heres*, still the possession of a half was given to the patron. But the patron was excluded by the natural children of a freedman, not only by those in his power at the time of his death, but by those children also who had been emancipated or given in adoption, provided that they were instituted heirs for some part, or, in case they were omitted, had demanded the possession *contra tabulas*, under the prætorian edict. For in no way did disinherited children exclude the patron.

GAI. iii. 41.

The prætor considered it hard that a testament, or *sui heredes* gained by adoption or by the marriage of a wife *in manu*, should exclude the patron. This was to exclude him by purely voluntary acts of the freedman. If the freedman had children really born to him, that constituted a good reason why the patron should be excluded, and in this case the prætor did not interfere. It is to be observed that the prætor left the law as it was if it was a *patrona*, or a female child of the *patronus*, who was excluded; but by the *lex Papia Poppæa* (A.D. 9) women with a certain number of children were placed on a level with men in this respect. (GAI. iii. 49; ULP. *Reg.* 29. 6.)

2. Postea lege Papia adaucta sunt jura patronorum, qui locupletiores libertos habebant. Cautum est enim, ut ex bonis ejus, qui sestertiorum centum milium patrimonium reliquerit et pauciores quam tres liberos habebat, sive is testamento facto, sive intestato mortuus erat, virilis pars patrono deberetur. Itaque cum unum filium filiamve heredem reliquerit libertus, perinde pars dimidia patrono debebatur, ac si is sine ullo filio filiave decessisset: cum duos duasve heredes reliquerat, tertia pars debebatur patrono: si tres reliquerat, repellebatur patronus.

2. But afterwards the rights of patrons, who had wealthy freedmen, were enlarged by the *lex Papia*, which provided that the patron should have one equal share in the distribution of the effects of his freedman, whether dying testate or intestate, if the freedman had left a patrimony of a hundred thousand sesterces, and fewer than three children. Thus, if a freedman possessed of such a fortune left only one son or daughter as heir, a half was due to the patron, exactly as if the deceased had died testate, without having any son or daughter. But, when there were two heirs, male or female, a third part only was due to the patron; and, when there were three, the patron was wholly excluded.

GAI. iii. 42.

By the same law, freedwomen having four children were so far freed from the *jus patronatus* that the patron received only an equal share. (ULP. *Reg.* xxix. 3; GAI. iii. 44.)

3. Sed nostra constitutio, quam pro omnium notione Græca lingua,

3. But our constitution, published in a compendious form, and in the

compendioso tractatu habito, composuimus, ita hujusmodi causas definivit, ut si quidem libertus vel liberta minores centenariis sint, id est minus centum aureis habeant substantiam (sic enim legis Papiæ summam interpretati sumus, ut pro mile sestertiis unus aureus computetur), nullum locum habeat patronus in eorum successionem, si tamen testamentum fecerint. Sin autem intestati decesserint, nullo liberorum relicto, tunc patronatus jus, quod erat ex lege duodecim tabularum, integrum reservavit. Cum vero majores centenariis sint, si heredes vel bonorum possessores liberos habeant sive unum sive plures cujuscumque sexus vel gradus, ad eos successionem parentum deduximus, omnibus patronis una cum sua progenie semotis. Sin autem sine liberis decesserint, si quidem intestati, ad omnem hereditatem patronos patronasque vocavimus: si vero testamentum quidem fecerint, patronos autem vel patronas præterierint, cum nullos liberos haberent vel habentes eos exheredaverint, vel mater sive avus maternus eos præterierit, ita ut non possint argui inofficiosa eorum testamenta: tunc ex nostra constitutione per bonorum possessionem contra tabulas non dimidian, ut ante, sed tertiam partem bonorum liberti consequantur, vel quod deest eis, ex constitutione nostra repleatur, si quando minus tertia parte bonorum suorum libertus vel liberta eis reliquerint, ita sine onere, ut nec liberis liberti libertæve ex ea parte legata vel fideicommissa præstentur, sed ad coheredes hoc onus redundaret; multis aliis casibus a nobis in præfata constitutione congregatis, quos necessarios esse ad hujusmodi juris dispositionem perspeximus: ut tam patroni patronæque quam liberi eorum nec non qui ex transverso latere veniunt usque ad quintum gradum ad successionem libertorum vocentur, sicut ex ea constitutione intellegendum est: ut si ejusdem patroni vel patronæ vel duorum duarum pluriumve sint liberi, qui proximior est, ad liberti seu libertæ vocetur successionem et in capita, non in stirpes dividatur successio, eodem modo et in his, qui ex transverso latere veniunt, servando. Pæne enim consonantia jura

Greek language, for the information of all men, established the following rules. If a freedman or freedwoman are less than *centenarii*, i.e. when their fortune does not reach a hundred *aurei* (the amount at which we estimated the sum mentioned in the *lex Papia*, counting one *aureus* for a thousand sesterces), the patron shall not be entitled to any share in the succession, provided the deceased has made a testament. But where a freed man or woman dies intestate, and without children, the right of patronage is maintained undiminished, and is as it formerly was, according to the law of the Twelve Tables. But if a freed person leaves more than a hundred *aurei*, and has one descendant or several, whatever be their sex or degree, as his heirs or the possessors of his goods, such descendant or descendants shall succeed their ascendant to the exclusion of the patron and his issue; but if he dies without children and intestate, we have called the patron or patroness to his whole inheritance. If, however, he has made a testament, omitting his patron or patroness, and has left no children, or has disinherited them, or if a mother or maternal grandfather has omitted them, so however that such testaments cannot be attacked as inofficious, then, according to our constitution, the patron or patroness shall succeed by a possession *contra tabulas*, not to a half as formerly, but to the third part of the estate of the deceased freedman, or shall have any deficiency made up in case the freed man or woman has left the patron or patroness a less share than a third of his or her estate. But this third part shall not be subject to any charge, so much so that it shall not furnish anything towards any legacies or *fideicommissa*, even though given for the benefit of the children of the deceased; but the whole burden shall fall exclusively on the co-heirs of the patron. In the same constitution we have collected many other decisions which we thought necessary to settle the law on the subject. Thus, patrons and patronesses, their children and collateral relations, so far as the fifth degree, are called to the succession of their freedmen and freedwomen, as may be seen in the constitution itself. And if there be several children, whether of one, two, or more patrons or patronesses, the

ingenuitatis et libertinitatis in successionibus fecimus.

nearest in degree is called to the succession of the freedman or freedwoman; and the estate is divided *in capita* and not *in stirpes*. It is the same with collaterals; for we have made the laws of succession as regards persons freeborn and as regards enfranchised slaves almost the same.

C. vi. 4. 4.

Doing away with all distinction of sex, and making the claim of the *patrona* the same as that of the *patronus*, and the position of the *liberta* the same as that of the *libertus*, Justinian thus regulates the succession *ab intestato:* first come the children of the freedman, whether in his power or not, or even if born before he was enfranchised; then, if he has no children, come the patron and his descendants; in default of these, the collaterals of the patron to the fifth degree. If the freedman has children, he can make any testament he pleases; if he has not, he can only make what testament he pleases provided his fortune is less than one hundred *aurei;* if it is more, he must leave the patron one unencumbered third, or the law will give this third *contra tabulas*.

4. Sed hæc de his libertinis hodie dicenda sunt, qui in civitatem Romanam pervenerunt, cum nec sunt alii liberti, simul et dediticiis et Latinis sublatis, cum Latinorum legitimæ successiones nullæ penitus erant, qui licet ut liberi vitam suam peragebant, attamen ipso ultimo spiritu simul animam atque libertatem amittebant, et quasi servorum ita bona eorum jure quodammodo peculii ex lege Junia manumissores detinebant. Postea vero senatusconsulto Largiano cautum fuerat, ut liberi manumissoris, non nominatim exheredati facti, extraneis heredibus eorum in bonis Latinorum præponerentur. Quibus supervenit etiam divi Trajani edictum, quod eundem hominem, si invito vel ignorante patrono ad civitatem venire ex beneficio principis festinavit, faciebat vivum quidem civem Romanum, Latinum autem morientem. Sed nostra constitutione propter hujusmodi condicionum vices et alias difficultates cum ipsis Latinis etiam legem Juniam et senatusconsultum Largianum et edictum divi Trajani in perpetuum deleri censuimus, ut omnes liberti civitate Romana fruantur, et mirabili modo quibusdam adjectionibus ipsas vias, quæ in Latinitatem ducebant, ad civita-

4. What we have said relates in these days to freedmen who are citizens of Rome; for there are now no others, there being no more *dediticii* or *Latini*. And the *Latini* never enjoyed any legal right of succession; for although they lived as free, yet, with their last breath, they lost at once their life and liberty: and their goods, like those of slaves, were claimed by their manumittor, as a kind of *peculium*, by virtue of the *lex Junia Norbana*. It was afterwards provided by the *senatusconsultum Largianum*, that the children of a manumittor, not disinherited by name, should, in the succession to the goods of a Latin, be preferred to any strangers whom a manumittor might institute his heirs. The edict of the Emperor Trajan followed, by which, if a slave, either against the will or without the knowledge of his patron, had managed to obtain Roman citizenship by favour of the emperor, he was regarded as a Roman citizen during his life, but at his death was looked on as a Latin. But we, being dissatisfied with the difficulties attending these changes of condition, have thought proper, by our constitution, for ever to abolish the *Latini*, and with them the *lex Junia*, the *senatusconsultum Largianum*, and the edict of Trajan; so that all freedmen whatever become citizens of Rome.

tem Romanam capiendam transposuimus.

And we have happily contrived, by some additional dispositions, that the very modes used to confer the freedom of Latins have now become modes of conferring Roman citizenship.

GAI. iii. 56-58, 63-65, 71-73; C. vii. 6.

Dediticii and *Latini Juniani*. See Bk. i. Tit. 5. 3 and note.

Senatusconsulto Largiano. This *senatusconsultum* was passed in the time of Claudius (A.D. 42), and in the consulate of Lupus and Largus. (GAI. iii. 63-67.) As we might infer from the text, the rights of the children of the patron to the succession of a *Latinus Junianus* remained if they were disinherited in any other way than by name.

By the edict of Trajan the rights of the patron were, in the case mentioned in the text, restored at the death of a *Latinus* exactly as if the *Latinus* had never become a citizen by imperial rescript. (GAI. iii. 72.)

TIT. VIII. DE ADSIGNATIONE LIBERTORUM.

In summa, quod ad bona libertorum, admonendi sumus, senatum censuisse, ut quamvis ad omnes patroni liberos, qui ejusdem gradus sint, æqualiter bona libertorum pertineant, tamen liceret parenti uni ex liberis adsignare libertum, ut post mortem ejus solus is patronus habeatur, qui adsignatus est, et ceteri liberi, qui ipsi quoque ad eadem bona, nulla adsignatione interveniente, pariter admitterentur, nihil juris in his bonis habeant. Sed ita demum pristinum jus recipiunt, si is, cui adsignatus est, decesserit, nullis liberis relictis.

Finally, with regard to the goods of freedmen, we must remember that the senate has enacted, that although the goods of freedmen belong equally to all the children of the patron who are in the same degree, yet an ascendant may assign a freedman to any one of his children, so that, after the death of the ascendant, the child, to whom the freedman was assigned, is alone considered as his patron, and the other children, who would have been equally admitted had there been no assignment, are wholly excluded. But if the child to whom the assignment has been made dies without issue they regain their former right.

D. xxxviii. 4. 1. pr.

The senate enacted this by the *consultum* mentioned in paragr. 3.

1. Nec tantum libertum, sed etiam libertam, et non tantum filio nepotive, sed etiam filiæ neptive adsignare permittitur.

1. Not only a freedman, but a freedwoman may be assigned, and not only to a son or grandson, but to a daughter or granddaughter.

D. xxxviii. 4. 1. pr., and 4. 3. 1, 2.

But it was necessary that the child or grandchild should be in the power of the patron.

2. Datur autem hæc adsignandi facultas ei, qui duos pluresve liberos in potestate habebit, ut eis, quos in

2. The power of assigning freed persons is given to him who has two or more children in his power, and it

potestate habet, adsignare ei libertum libertamve liceat. Unde quærebatur, si eum, cui adsignaverit, postea emancipaverit, num evanescat adsignatio? Sed placuit, evanescere, quod et Juliano et aliis plerisqu evisum est.

is to children in his power that a father may assign a freedman or freedwoman. Hence the question arose, supposing a father assigned a freedman to his son, and afterwards emancipated that son, whether the assignment would be destroyed. It has been determined that it is destroyed; such was the opinion of Julian and of most others.

D. xxxviii. 4. 1. pr.

The *senatusconsultum* did not allow the patron to give the freedman new heirs, but only to give a preference to particular heirs. If the children passed out of the power of the patron, they would cease to be heirs of the freedman.

3. Nec interest, testamento quis adsignet an sine testamento: sed etiam quibuscumque verbis hoc patronis permittitur facere ex ipso senatusconsulto, quod Claudianis temporibus factum est Suillo Rufo et Ostorio Scapula consulibus.

3. It makes no difference, whether the assignment of a freedman be made by testament, or without a testament. And patrons may make it in any terms whatever, by virtue of a *senatusconsultum* passed in the time of Claudius, in the consulship of Suillus Rufus and Ostorius Scapula.

D. xxxviii. 4. 1. pr. and 3.

The date of this *senatusconsultum* is given as A.D. 45.

Just as any expression of the wishes of a patron sufficed to make an assignment, so any expression of a contrary wish sufficed to revoke it. (D. xxxviii. 4. 1. 4.) The mere disinheriting of a child did not revoke a previous assignment. (D. xxxviii. 4. 1. 6.)

Tit. IX. DE BONORUM POSSESSIONIBUS.

Jus bonorum possessionis introductum est a prætore emendandi veteris juris gratia. Nec solum in intestatorum hereditatibus vetus jus eo modo prætor emendavit, sicut supra dictum est, sed in eorum quoque, qui, testamento facto, decesserint. Nam si alienus postumus heres fuerit institutus, quamvis hereditatem jure civili adire non poterat, cum institutio non valebat, honorario tamen jure bonorum possessor efficiebatur, videlicet cum a prætore adjuvabatur: sed hic e nostra constitutione hodie recte heres instituitur, quasi et jure civili non incognitus.

The system of *bonorum possessiones* was introduced by the prætors as an amendment of the ancient law, this amendment being made with regard to the inheritances not only of intestates, as we have said above, but of those also who die after making a testament. For if a posthumous stranger was instituted heir, although he could not enter upon the inheritance by the civil law, inasmuch as his institution would not be valid, yet by the prætorian law he might be made the possessor of the goods, because he received the assistance of the prætor. But such a person may now, by our constitution, be legally instituted heir as being not unrecognised even by the civil law.

Gai. ii. 242; D. i. 1. 71; D. xxxviii. 6. 1. pr.

The *jus civile* knew of no other mode of succession than that of

those who were strictly *heredes*. The prætor introduced a new mode, that by giving possession of the goods. This was, in its origin, merely the placing of the person best entitled in at least temporary possession of the *hereditas* in case this possession was disputed; and then the prætor, being thus called on to admit to the possession, in process of time regulated this admission by the feeling of natural justice which it was part of his province to entertain, and admitted, in many cases, those whose blood gave a claim, in preference to those whom the course of the civil law marked out. He did not, indeed, admit any one whom the law expressly rejected; for the prætor could not openly violate the law; but when the law was silent, the prætor took advantage of this silence to admit persons whom the law passed over. (D. xxxvii. 1. 12. 1.) He never gave the *dominium Quiritarium* in any of the goods of the inheritance, but only the *dominium bonitarium* (see Introd. sec. 62), i.e. he made all that constituted the inheritance a part of the goods ('*in bonis*') of the person to whom he gave the possession, and then usucapion gave this person the legal ownership.

The constitution referred to in the text is not in the Code we now have.

1. Aliquando tamen neque emendandi neque impugnandi veteris juris, sed magis confirmandi gratia pollicetur bonorum possessionem. Nam illis quoque, qui recte facto testamento heredes instituti sunt, dat secundum tabulas bonorum possessionem: item ab intestato suos heredes et adgnatos ad bonorum possessionem vocat: sed et remota quoque bonorum possessione, ad eos hereditas pertinet jure civili.

1. But the prætor sometimes bestows the possession of goods with a wish not to amend or impugn the old law, but to confirm it; for he also gives possession *secundum tabulas* to those who are appointed heirs by regular testament. He also calls *sui heredes* and *agnati* to the possession of the goods of intestates, and yet the inheritance would be theirs by the civil law, even if the prætor did not give the possession of the goods.

GAI. iii. 34; D. xxxvii. 1. 6. 1.

The person to whom the prætor gave the *bonorum possessio* could make use of the interdict (see Introd. sec. 107) beginning with the words '*Quorum bonorum*'; and as this was the readiest way of procuring the prætor's aid in being placed in possession, the heir might be glad to adopt it, though the *possessio bonorum* did not give him, as it did others, a title to succeed, which he would not otherwise have had.

In cases provided for by the edict the prætor gave possession in the exercise of his executive authority (*possessio edictalis*). If there were special circumstances in the case, the prætor would, after hearing opponents, give a special possession (*possessio decretalis*) which was not always protected by the interdict *Quorum bonorum*, but might be protected only by an interdict forbidding forcible eviction. (D. xxxvii. 9. 1. 14; xxxvii. 1. 3. 8; xliii. 4.)

2. Quos autem prætor solus vocat ad hereditatem, heredes quidem ipso jure non fiunt (nam prætor heredem

2. But those whom the prætor alone calls to an inheritance, do not in law become heirs, inasmuch as the prætor

facere non potest: per legem enim tantum vel similem juris constitutionem heredes fiunt, veluti per senatusconsultum et constitutiones principales): sed cum eis prætor dat bonorum possessionem, loco heredum constituuntur et vocantur bonorum possessores. Adhuc autem et alios complures gradus prætor fecit in bonorum possessionibus dandis, dum id agebat, ne quis sine successore moriatur: nam angustissimis finibus constitutum per legem duodecim tabularum jus percipiendarum hereditatum prætor ex bono et æquo dilatavit.

cannot make an heir, for heirs are made only by a law, or by what has the effect of a law, as a *senatusconsultum* or an imperial constitution. But when the prætor gives any persons the possession of goods, they stand in the place of heirs, and are called the possessors of the goods. The prætor has also devised many other orders of persons to whom the possession of goods may be granted, from a wish to insure that no man should die without a successor. In short, the right of succeeding to inheritances, which was confined within very narrow limits by the law of the Twelve Tables, has been extended by the prætor in conformity to the principles of justice and equity.

GAI. iii. 18, 25, 32, 33.

3. Sunt autem bonorum possessiones ex testamento quidem hæ. Prima, quæ præteritis liberis datur vocaturque contra tabulas. Secunda, quam omnibus jure scriptis heredibus prætor pollicetur ideoque vocatur secundum tabulas. Et cum de testamentis prius locutus est, ad intestatos transitum fecit. Et primo loco suis heredibus et his, qui ex edicto prætoris suis connumerantur, dat bonorum possessionem, quæ vocatur unde liberi. Secundo legitimis heredibus: tertio decem personis, quas extraneo manumissori præferebat (sunt autem decem personæ hæ: pater, mater, avus, avia, tam paterni quam materni, item filius, filia, nepos, neptis, tam ex filio quam ex filia, frater, soror, sive consanguinei sive uterini): quarto cognatis proximis: quinto tum quem ex familia: sexto patrono et patronæ liberisque eorum et parentibus: septimo viro et uxori: octavo cognatis manumissoris.

3. The testamentary possessions of goods are these. First, that which is given to children passed over in the testament; this is called *contra tabulas*. Secondly, that which the prætor promises to all those legally instituted heirs, and is therefore called *possessio secundum tabulas*. After having spoken of testaments, he passes on to intestacies: and first he gives the possession of goods, called *unde liberi*, to the *sui heredes*, or to those who by the prætorian edict are numbered among the *sui heredes*; secondly, to the legal heirs; thirdly, to the ten persons who were preferred to a patron, if a stranger; and these ten persons were, a father; a mother; a grandfather or grandmother, paternal or maternal; a son; a daughter; a grandson or granddaughter, as well by a daughter as by a son; a brother or sister, either by the father or uterine. Then, fourthly, he gives the possession of goods to the nearest *cognati*; fifthly, '*tum quem ex familia*,' to the nearest member of the family of the patron; sixthly, to the patron or patroness, and to their children and ascendants; seventhly, to a husband and wife; eighthly, to the *cognati* of the manumittor.

GAI. iii. 26-30; D. xxxviii. 6. 1. pr. and 1.

The various kinds of possessions of goods may be divided according as they were testamentary (*ex testamento*) or *ab intestato*. Under the first head come the two kinds called *contra tabulas* and *secundum tabulas*.

1. The *possessio contra tabulas* was given, as it is said in the text, to children passed over in the testament. It was also

given, as we have seen, to a patron passed over. (Tit. 7. 1.) It was not given against the testament of women, as they had no *sui heredes*. (D. xxxvii. 4. 4. 2.)

2. The *possessio secundum tabulas* was given not only when the testament was in due form and valid, but also when it would have had no effect according to the civil law. The prætor gave the possession though the testament was defective in form, as, for instance, if it contained no *familiæ mancipatio* or nuncupation. (ULP. *Reg.* 28. 6. See Bk. ii. Tit. 17. 6.) The prætor, again, only required that the testator should have been capable of making a testament at the time he made it and at his death, without regard to the intermediate time. (See Bk. ii. Tit. 10. 6 note ; D. xxxvii. 11. 1. 8.) He permitted the institution of the posthumous child of a stranger (see Bk. ii. Tit. 20. 26), and would, in cases where a gift was conditional, place the heir or legatee in possession of the goods while the condition was pending, and remove him if the condition was not fulfilled. (D. xxxvii. 11. 5. 6.)

The *possessio secundum tabulas* was not given until after that *contra tabulas*, that is, not until it was ascertained that there were no children passed over, or that they had made no claim within the time fixed by law. (D. xxxvii. 11. 2. pr.)

If there was no testament, the prætor gave the possession under one of the following heads: *Unde liberi—Unde legitimi—Unde decem personæ—Unde cognati—Tum quem ex familia—Unde liberi patroni patronæque et parentes eorum—Unde vir et uxor —Unde cognati manumissoris.* (ULP. *Reg.* xxviii. 7.)

These are given in the text in the order in which they occurred in the edict ; and those beginning with *unde* are in that form, by a contraction for *ea pars edicti unde liberi vocantur, unde legitimi vocantur*, &c.

Four only have reference to the succession of persons of free birth : *Unde liberi, unde legitimi, unde cognati, unde vir et uxor.* The other four are only applicable to freedmen.

1. The *possessio unde liberi* was given to the *sui heredes* and those called with them, in case there was no testament, or one wholly inoperative. If there was a testament not allowed to operate, the *possessio* would be that *contra tabulas*.

2. That *unde legitimi* was given to all those who would be the heirs of the deceased by law, that is, to those summoned to the succession by the law of the Twelve Tables, and those placed in the same rank by subsequent legislation. This part of the edict ran thus :—*Tum quem ei heredem esse oporteret, si intestatus mortuus esset.* (D. xxxviii. 7. 1.) It included the *sui heredes*, if they did not apply for, or even if they had refused, the *possessio unde liberi*, the *agnati*, those placed by the constitutions in the rank of *agnati*, the mother under the *senatusconsultum Tertullianum*, the children under the *senatusconsultum Orphitianum*, and the patron and his children as the *heredes legitimi* of their *libertus*.

3. That *unde decem personæ* was given to the ten persons mentioned in the text in preference to a stranger who might have emancipated a free person, after having acquired him *in mancipio* for the purpose of the fictitious sale necessary to emancipation. This emancipation made the emancipator the patron, and gave him rights of succession, which the prætor postponed by the edict.

4. The *possessio unde cognati* created a new class of persons interested in the succession by ties of blood which gave no claim except under the edict. The *sui heredes* and *legitimi*, if they had omitted to come in under the previous parts of the edict, might come in as *cognati*.

5. The *possessio tum quem ex familia* was given to the nearest member of the family of the patron (ULP. *Reg.* 28. 7) in default of the *sui heredes* taking under the *unde liberi*, or of the patron or his children taking under the *unde legitimi*. The words seem to be an abridgment of part of the edict, '*tum quem ex familia patroni proximum oportebit vocabo*'. For the first two words is read sometimes *tanquam*, and this reading, which derives some support from the paraphrase of Theophilus, is adopted by Huschke; but *tum quem* seems most in keeping with the usual phraseology of the edict. (D. xxxviii. 7. 1.)

6. The *possessio unde liberi patroni patronæque et parentes eorum* was given to the descendants of the patron, whether they had been in the power of the patron or not, and to the ascendants, whether the patron had been in their power or not—thus going a step beyond the last-mentioned possession, which was only given to a person in the family of the patron. This is as probable an account as any of the use of this and the last *possessio;* but so little is known respecting them, that we cannot be certain how they were applied.

7. The *possessio unde vir et uxor* gave husband and wife reciprocal rights of succession. The only mode in which one married person succeeded by the *jus civile* to the goods of another was when the wife passed into the power of her husband by *in manum conventio*, for she then succeeded as his daughter. (GAI. iii. 3.) The husband and wife succeeded in default of *cognati*.

8. The *possessio unde cognati manumissoris* was given to all the blood relations of the patron. In the possession given exclusively with reference to the goods of freedmen, it was the same as with those given alike of the goods of free persons and of freedmen; any one who might have applied for an earlier possession might, if he failed to do so, apply for a later possession, in the terms of which he was included. Thus the *quem proximum* might apply as for the *possessio unde liberi patroni*, &c., and both he and one of the *liberi patroni* might have applied for that *unde cognati manumissoris*.

If there was no one to whom possession of goods could be given, the right to the goods devolved to the people, and, in the times of the later emperors, to the *fiscus*. (*Si nemo sit, ad quem*

bonorum possessio pertinere possit, aut sit quidem, sed jus suum omiserit, populo bona deferuntur ex lege Julia caducaria.) (ULP. *Reg.* 28. 7.)

4. Sed eas quidem prætoria induxit jurisdictio. Nobis tamen nihil incuriosum prætermissum est, sed nostris constitutionibus omnia corrigentes, contra tabulas quidem et secundum tabulas bonorum possessiones admisimus utpote necessarias constitutas, nec non ab intestato unde liberi et unde legitimi bonorum possessiones. Quæ autem in prætoris edicto quinto loco posita fuerat, id est unde decem personæ, eam pio proposito et compendioso sermone supervacuam ostendimus: cum enim præfata bonorum possessio decem personas præponebat extraneo manumissori, nostra constitutio, quam de emancipatione liberorum fecimus, omnibus parentibus eisdemque manumissoribus contracta fiducia manumissionem facere dedit, ut ipsa manumissio eorum hoc in se habeat privilegium et supervacua fiat prædicta bonorum possessio. Sublata igitur præfata quinta bonorum possessione, in gradum ejus sextam antea bonorum possessionem reduximus et quintam fecimus, quam prætor proximis cognatis pollicetur.

4. Such are the possessions of goods introduced by the prætor's authority. We ourselves, who have passed over nothing negligently, but have wished to amend everything, by our constitutions have admitted as indispensably necessary the possessions of goods *contra tabulas* and *secundum tabulas*, and also the possessions *ab intestato*, called *unde liberi* and *unde legitimi;* but with a kind intention, and in a few words, we have shown that the possession called *unde decem personæ*, which held the fifth place in the prætor's edict, is superfluous; for ten kinds of persons were therein preferred to a patron if a stranger; but by our constitution on the subject of the emancipation of children, parents themselves are the manumittors of their children, as if under a fiduciary contract, so that this privilege belongs necessarily to the manumission they go through, and the possession *unde decem personæ* is now useless. We have suppressed it therefore, and, putting the sixth in its place, have now made that the fifth, by which the prætor gives the succession to the nearest *cognati.*

C. viii. 49. 6.

See Tit. 2. 8.

5. Cumque antea septimo loco fuerat bonorum possessio tum quem ex familia et octavo unde liberi patroni patronæque et parentes eorum, utramque per constitutionem nostram quam de jure patronatus fecimus, penitus vacuavimus: cum enim ad similitudinem successionis ingenuorum libertinorum successiones posuimus, quas usque ad quintum tantummodo gradum coartavimus, ut sit aliqua inter ingenuos et libertos differentia, sufficiunt eis tam contra tabulas bonorum possessio quam unde legitimi et unde cognati, ex quibus possint sua jura vindicare, omni scrupulositate et inextricabili errore duarum istarum bonorum possessionum resoluta.

5. As to the possession *tum quem ex familia*, formerly in the seventh place, and the possession *unde liberi patroni patronæque et parentes eorum*, in the eighth, we have now annulled them both by our constitution concerning the right of patronage. For having made the successions of *libertini* like those of *ingenui*, except that we have limited the former to the fifth degree, so that there may still remain some difference between them, we think that the possessions *contra tabulas*, *unde legitimi*, and *unde cognati* may suffice for claimants to vindicate their rights; all the subtle and intricate niceties of those two kinds of possessions, *tum quem ex familia* and *unde patroni*, being done away with.

The possession *tum quem ex familia* is here said to be in the seventh place, because it was in the fifth place of the *possessiones* regarding intestacies, and the two *possessiones* regarding testamentary successions came before.

6. Aliam vero bonorum possessionem, quæ unde vir et uxor appellatur et nono loco inter veteres bonorum possessiones posita fuerat, et in suo vigore servavimus et altiore loco, id est sexto, eam posuimus, decima veteri bonorum possessione, quæ erat unde cognati manumissoris, propter causas enarratas merito sublata: ut sex tantummodo bonorum possessiones ordinariæ permaneant suo vigore pollentes.

7. Septima eas secuta, quam optima ratione prætores introduxerunt. Novissime enim promittitur edicto his etiam bonorum possessio, quibus ut detur, lege vel senatusconsulto vel constitutione comprehensum est, quam neque bonorum possessionibus, quæ ab intestato veniunt, neque eis, quæ ex testamento sunt, prætor stabili jure connumeravit, sed quasi ultimum et extraordinarium auxilium, prout res exigit, accommodavit scilicet his, qui ex legibus, senatusconsultis, constitutionibus principum ex novo jure vel ex testamento vel ab intestato veniunt.

6. The other possession of goods, called *unde vir et uxor*, which held the ninth place among the ancient possessions, we have preserved in full force, and have given it a higher place, namely, the sixth. The tenth of the ancient possessions, called *unde cognati manumissoris*, has been deservedly abolished for reasons already given; and there now, therefore, remain in force only six ordinary possessions of goods.

7. To these a seventh possession has been added, which the prætors have most properly introduced. For by the last disposition of the edict, possession of goods is promised to all those to whom it is given by any law, *senatusconsultum*, or constitution. The prætor has not positively numbered this possession of goods either with the possessions of the goods of intestates, or of persons who have made a testament; but has given it, according to the exigence of the case, as the last and extraordinary resource of those who are called to the successions of intestates, or under a testament whether by a law, a *senatusconsultum*, or, in later times, by an imperial constitution.

D. xxxviii. 14.

The difference between the *possessio quibus ut detur, lege vel senatusconsulto vel constitutione comprehensum est*, or, as it was sometimes called, the *possessio tum quibus ex legibus* (THEOPH. *Paraphr.*), and the *possessio unde legitimi*, was, that the first was given when the law, &c., expressly declared that the possession of goods was to be given; the latter when the law, &c., gave the *hereditas*, and the prætor gave the *possessio*. It was, for instance, by means of the possession *uti ex legibus*, that the patron took concurrently with the children of the *libertus*, by virtue of the *lex Papia Poppæa*.

8. Cum igitur plures species successionum prætor introduxisset easque per ordinem disposuisset et in unaquaque specie successionis sæpe plures extent dispari gradu personæ: ne actiones creditorum differrentur, sed haberent, quos convenirent, et ne facile in possessionem bonorum defuncti mitterentur et eo modo sibi consulerent, ideo petendæ bonorum possessioni certum tempus præfinivit. Liberis itaque et parentibus tam naturalibus quam adoptivis in petenda bonorum possessione anni

8. As the prætor thus introduced and arranged in order many kinds of successions, and as in each rank of succession persons in different degrees of relationship might often be found, therefore in order on the one hand that the actions of creditors might not be delayed, but there might be a proper person against whom to bring them, and on the other hand that the creditors might not possess themselves of the effects of the deceased too easily, and consult solely their own advantage, the prætor fixed a certain time within

spatium, ceteris centum dierum dedit.

which the possession of the goods was to be demanded. To ascendants and children, whether natural or adoptive, he allowed one year, within which they must ask for possession. To all other persons he allowed a hundred days.

D. xxxviii. 9. 1. pr. and 12.

The *species successionum* correspond to the different *possessiones*.

9. Et si intra hoc tempus aliquis bonorum possessionem non petierit, ejusdem gradus personis adcrescit: vel si nemo ex eo sit, deinceps ceteris proinde bonorum possessionem ex successorio edicto pollicetur, ac si is, qui præcedebat, ex eo numero non esset. Sed si quis ita delatam sibi bonorum possessionem repudiaverit, non quousque tempus bonorum possessioni præfinitum excesserit, expectatur, sed statim ceteri ex eodem edicto admittuntur. In petenda autem bonorum possessione dies utiles singuli considerantur.

9. And if any person does not claim possession within the time limited, the possession accrues to those in the same degree with himself; and if there are none of that degree, the prætor, by the successory edict, gives the possession to the succeeding degrees, exactly as if he who preceded had not been in the degree in which he was. But if a man refuses the possession of goods when it is thus offered to him, there is no necessity to wait until the time limited is expired, but the others in succession are instantly admitted under the same edict. In reckoning the time allowed for applications for the possession of goods, only those days which are *utiles* are counted.

D. xxxvii. 1. 3. 9; D. xxxvii. 1. 4. 5; D. xxxviii. 9. 1. 6, 8, 10; D. xxxviii. 15. 2.

10. Sed bene anteriores principes et huic causæ providerunt, ne quis pro petendo bonorum possessiones curet, sed, quocumque modo si admittentis eam indicium, intra statuta tamen tempora, ostenderit, plenum habeat earum beneficium.

10. Former emperors have wisely provided that no person need trouble himself as to the possession of goods in the way of making an express demand; for if he has in any manner signified within the appointed time his wish to accept the possession, he shall enjoy the full benefit of the possession he can claim.

C. vi. 9. 8, 9.

Only those *dies* were considered *utiles* which were subsequent to the person entitled to the possession being aware of, and capable of claiming, his right, and which were not days on which magistrates did not transact business (*dies nefasti*). Demand of possession was to be made before a magistrate, that is, before the prætor in the city, and the *præses* in the province; for the possession did not devolve by course of law, but had to be expressly asked for within a prescribed time. A particular formality in the terms of the demand was held necessary, the applicant having to say '*da mihi hanc bonorum possessionem*' (THEOPH. *Paraphr.*), until a constitution of the Emperor Constantius (C. vi. 9. 9) permitted the application to be made in any terms, and before any magis-

trate, and another constitution of the same emperor excused those whom ignorance of what was the proper cause, or whom absence prevented from making an application. (C. vi. 9. 8.) In the time of Justinian there was no application before a magistrate; any act that manifested the wish to have the possession was enough.

Sometimes the possession of goods was said to be given *sine re*, as opposed to *cum re*. (GAI. iii. 35-38; ULP. *Reg.* 28. 13.) The possession might be claimed, in many cases, by persons who were entitled to enter on the inheritance as heirs under the civil law. If these persons entered on the inheritance without demanding possession of the goods, the right to this possession devolved, at the expiration of the time in which they might have claimed it, to the next class entitled to it. But if the person standing next in the order of prætorian succession demanded the possession in such a case, he received it, but only *sine re*, i.e. he was placed in the legal position of possessor of the goods, but did not really have any share in those goods which formed the inheritance of the heir under the civil law.

As we have now finished the subject of successions *ab intestato*, as treated of in the Institutes, and seen the system prevailing when the Institutes were published, this is the most natural place to notice briefly the complete change introduced by the 118th and 127th Novels, which were issued respectively in the years 543 and 547. By this sweeping change, the difference between the *possessio bonorum* and the *hereditas*, and that between *agnati* and *cognati* (except in the case of arrogation), were entirely suppressed, and three orders of succession were created: the first, that of descendants; the second, that of ascendants; the third, that of collaterals. (1.) The descendants succeeded, whether emancipated or not, and whether adoptive or natural, to the exclusion of all other relations, and without distinction of sex or degree. When they were in the first degree, they shared the inheritance *per capita;* when in the second, they shared it *per stirpes*. (2.) If there were no descendants, the succession belonged to the ascendants, except that, when there were brothers or sisters of the whole blood, the ascendants shared the inheritance with them, each person who had a claim to succeed taking an equal share. When there were several ascendants, the nearest excluded the more remote; if two or more ascendants of the same degree were not in the same line, that is, were partly in the paternal, partly in the maternal line, then the ascendants of one line took one half, and the ascendants of the other took the other half, although there might be more of the same degree in one line than in the other. (3.) If there were no ascendants, then came, first, brothers and sisters of the whole blood, then brothers and sisters of the half-blood, no distinction being made between *consanguinei, -æ,* and *uterini, -æ*. The children of a deceased brother or sister were allowed to represent their deceased parent, and to receive the

share that parent would have received; but the grandchildren of a brother or sister were not allowed to represent their grandfather or grandmother. If there were no brothers and sisters, or children of brothers and sisters, the nearest relation, in whatever degree, succeeded; if there were several in the same degree, they shared the inheritance *per capita.* Finally, it is specially provided that these reforms are to apply only to those persons *qui catholicæ fidei sunt.*

TIT. X. DE ADQUISITIONE PER ADROGATIONEM.

Est et alterius generis per universitatem successio, quæ neque lege duodecim tabularum neque prætoris edicto, sed eo jure, quod consensu receptum est, introducta est.

There is also another kind of universal succession, introduced neither by the law of the Twelve Tables, nor by the edict of the prætor, but by the law which rests on general consent.

GAI. iii. 82.

1. Ecce enim cum paterfamilias sese in adrogationem dat, omnes res ejus corporales et incorporales quæque ei debitæ sunt, adrogatori ante quidem pleno jure adquirebantur, exceptis his, quæ per capitis deminutionem pereunt, quales sunt operarum obligationes et jus adgnationis. Usus etenim et ususfructus licet his antea connumerabantur, attamen capitis deminutione minima eos tolli, nostra prohibuit constitutio.

1. For if the father of a family gives himself in arrogation, his property corporeal and incorporeal, and the debts due to him, were formerly acquired in full ownership by the arrogator, with the exception only of those things which were lost by the *capitis deminutio*, as the obligation of services and the rights of agnation. Formerly, use and usufruct were numbered among these, but one of our constitutions prevents their extinction by the *minima deminutio.*

GAI. iii. 83; C. iii. 33. 16.

Gaius remarks that the property of the wife who passed *in manum viri* was acquired by her husband exactly as fully as that of the *paterfamilias* was by the person who arrogated him. Everything belonging to them passed to the husband or arrogator, except only those things which were *ipso facto* destroyed by the change of *status;* for example, services which, as the price of his freedom, the freedman bound himself by oath to render to the patron, *operarum obligationes*, were due to him personally, and were no longer due if the patron passed into the power of another. The ties of agnation were also lost by the change of *status*, as the person arrogated passed out of his civil family.

2. Nunc autem nos eandem adquisitionem, quæ per adrogationem fiebat, coartavimus ad similitudinem naturalium parentum: nihil etenim aliud nisi tantummodo ususfructus tam naturalibus patribus quam adoptivis per filiosfamilias adquiritur in his rebus, quæ extrinsecus filiis obveniunt, dominio eis integro servato:

2. At the present day acquisitions by arrogation are restrained within the same limits as acquisitions by natural parents. Neither natural nor adoptive parents now acquire anything but the usufruct of those things which come to their children from any extraneous source, the children still retaining the *dominium.* But, if an arrogated son

mortuo autem filio adrogato in adoptiva familia etiam dominium ejus ad adrogatorem transit, nisi supersint aliæ personæ, quæ ex nostra constitutione patrem in his, quæ adquiri non possunt, antecedunt.

dies in his adoptive family, then the property also will pass to the arrogator, provided there exist none of those persons who, by our constitution, are preferred to the father in the succession of those things which cannot be acquired by him.

The order of succession fixed by later emperors and Justinian to the goods of the *filiusfamilias* coming to him from his mother, or as legacies, gifts, &c., from sources other than the father (*peculium adventitium*, which could not be acquired by the father, but only the usufruct of which passed to him), was—1. His children; 2. His brothers or sisters; 3. His ancestors, the father taking before the grandfather. (C. vi. 61. 3. 4, 6; C. vi. 59. 11.)

3. Sed ex diverso pro eo, quod is debuit, qui se in adoptionem dedit, ipso quidem jure adrogator non tenetur, sed nomine filii convenietur et, si noluerit eum defendere, permittitur creditoribus per competentes nostros magistratus bona, quæ ejus cum usufructu futura fuissent, si se alieno juri non subjecisset, possidere et legitimo modo ea disponere.

3. On the other hand, an arrogator is not directly bound to satisfy the debts of his adopted son, but he may be sued in his son's name; and if he refuses to answer for his son, then the creditors may, by order of the proper magistrates, seize upon and sell in the manner prescribed by law those goods, of which the usufruct, as well as the property, would have been in the debtor, if he had not made himself subject to the power of another.

GAI. iii. 84.

The arrogator succeeded to all the rights of action for debt which the person arrogated had, but not to the debts. For the arrogator was in the position of a father, who was not bound by the obligations of a son. Under the *jus civile*, the debts themselves were extinguished by the change of *status*; but the prætor made the property of the arrogated son answerable for them, and creating a sort of *restitutio in integrum* in favour of the creditor, gave an action against the arrogated as if the *capitis minutio* had not taken place; and then, if the arrogator did not guarantee the creditors, the prætor put the creditors in possession of the goods brought by the arrogated to the arrogator, with leave to sell them. (D. iv. 5. 2. 1; GAI. iii. 84.)

TIT. XI. DE EO, CUI LIBERTATIS CAUSA BONA ADDICUNTUR.

Accessit novus casus successionis ex constitutione divi Marci. Nam si hi, qui libertatem acceperunt a domino in testamento, ex quo non aditur hereditas, velint bona sibi addici libertatum conservandarum causa, audiuntur. Et ita rescripto divi

A new species of succession has been added by the constitution of the Emperor Marcus. For, if those slaves, to whom freedom has been given by the testament of their master, under which testament no one will accept the inheritance, wish that the property

Marci ad Popilium Rufum continetur.

should be adjudged to them, in order that effect may be given to the disposition for their enfranchisement, their request is granted. Such is the effect of a rescript addressed by the Emperor Marcus to Popilius Rufus.

D. xl. 4. 50. pr. and 1.

If no *heres ex testamento* accepted the inheritance, it devolved to the *heredes ab intestato*, and if no *heres ab intestato* accepted it, it devolved to the *fiscus*; if the *fiscus* would not accept it, the creditors could have the goods of the deceased sold for their benefit. But if the deceased had by testament or codicil given freedom to any slaves, then, after the inheritance had been successively rejected by the *heredes ex testamento*, the *heredes ab intestato*, and the *fiscus*, application might be made to have the goods given up to the applicant instead of being sold by the creditors, the applicant undertaking to enfranchise the other slaves and to satisfy the creditors, and then the applicant became the *bonorum possessor*, though not the owner of all the property of the deceased. If the inheritance was accepted by any heir, or if there were no slaves to whom the deceased had left their liberty, then this *addictio* could not take place.

Gaius makes no mention of this mode of acquisition *per universitatem*; a circumstance used to fix his date, as showing that he wrote before the time when Marcus Aurelius issued the rescript contained in the next paragraph.

1. Verba rescripti ita se habent: 'Si Virginio Valenti, qui testamento suo libertatem quibusdam adscripsit, nemine successore ab intestato existente, in ea causa bona esse cœperunt, ut veniri debeant: is, cujus de ea re notio est, aditus, rationem desiderii tui habebit, ut libertatum tam earum, quæ directo, quam earum, quæ per speciem fideicommissi relictæ sunt, tuendarum gratia addicantur tibi, si idonee creditoribus caveris de solido, quod cuique debetur, solvendo. Et hi quidem, quibus directa libertas data est, perinde liberi erunt, ac si hereditas adita esset: hi autem, quos heres rogatus est manumittere, a te libertatem consequantur: nisi si non alia condicione velis bona tibi addici, quam ut etiam qui directo libertatem acceperunt, tui liberti fiant; nam huic etiam voluntati tuæ, si ii, de quorum statu agitur, consentiant, auctoritatem nostram accommodamus. Et ne hujus rescriptionis nostræ emolumentum alia ratione irritum fiat, si fiscus bona agnoscere

1. The following are the terms of the rescript: 'If the estate of Virginius Valens, who by testament has given their freedom to certain slaves, must necessarily be sold, there being no successor *ab intestato*, then the magistrate who has the cognisance of the affair shall upon application attend to your request, that, for the sake of preserving the liberty of those to whom it was given, either directly or by a *fideicommissum*, the estate of the deceased may be adjudged to you, on condition that you give good security to the creditors that their claims shall be satisfied in full. And all those, to whom freedom was given directly, shall then become free, exactly as if the inheritance had been entered upon; but those whom the heir was ordered to manumit shall obtain their freedom from you only; unless you wish that the goods of the deceased should be adjudged to you on no other condition than that those slaves also who received their liberty directly by testament shall become your freedmen; for if those who are

voluerit, et hi, qui rebus nostris attendunt, scient, commodo pecuniario præferendam libertatis causam et ita bona cogenda, ut libertas his salva sit, qui eam adipisci potuerunt, si hereditas ex testamento adita esset.'

to receive their freedom agree to this, we are willing that your wishes in this respect shall be complied with. And, lest the benefit of this our rescript should be lost in another way, namely by the property being seized on behalf of the imperial treasury, be it known to the officers of our revenue, that the gift of liberty is to be attended to more than our pecuniary advantage; and seizure shall be made of the property in such a way as to preserve the freedom of those who would have been in a situation to obtain it, had the inheritance been entered on under the testament.'

D. xl. 5. 2, and 5. 4, 8, 11. 12, 17.

By a constitution of Gordian, it was declared that the rescript of Marcus Aurelius extended to cases in which a stranger, and not one of the slaves of the deceased, applied for the addiction. (C. vii. 2. 6.)

When the inheritance was not rejected, but accepted by the *heredes ab intestato* or by the *fiscus*, the *fiscus*, so far as regards the enfranchisement of the slaves, was placed by the latter part of this rescript in a different position from that which was occupied by the *heredes ab intestato;* whichever accepted it, the *addictio* could not take place, but the *fiscus* was ordered to fulfil the wishes of the deceased, while the *heredes ab intestato* were at liberty to disregard them.

2. Hoc rescripto subventum est et libertatibus et defunctis, ne bona eorum a creditoribus possideantur et veneant. Certe si fuerint ex hac causa bona addicta, cessat bonorum venditio; extitit enim defuncti defensor, et quidem idoneus, qui de solido creditoribus cavet.

2. This rescript is meant to favour both the gift of liberty and also the deceased testator, whose effects it prevents being seized and sold by creditors: for, of course, when goods are thus adjudged, in order that liberty may be preserved, there cannot be a sale by creditors, for there is some one to answer for the deceased, and very efficiently, as he gives security to the creditors for the full satisfaction of their claims.

3. Imprimis hoc rescriptum totiens locum habet, quotiens testamento libertates datæ sunt. Quid ergo, si quis intestatus decedens codicillis libertates dederit neque adita sit ab intestato hereditas? Favor constitutionis debet locum habere. Certe si testatus decedat et codicillis dederit libertatem, competere eam, nemini dubium est.

3. This rescript is applicable whenever freedom is conferred by testament. But what if a master dies intestate, having bequeathed freedom to his slaves by codicils, and the inheritance *ab intestato* is not entered upon? The benefit of the constitution shall extend to this case; of course, if the deceased dies testate, freedom given by codicils is effectual.

D. xl. 5. 2.

4. Tunc constitutioni locum esse, verba ostendunt, cum nemo successor ab intestato existat. Ergo quam-

4. The words of the constitution show, that it applies only when there is no successor *ab intestato*. There-

diu incertum sit, utrum existat an non, cessabit constitutio: si certum esse cœperit, neminem extare, tunc erit constitutioni locus.

fore, as long as it remains doubtful whether there is or is not a successor, the constitution is not applicable; but when it is certain that no one will enter upon the succession, it then takes effect.

D. xl. 5. 4. pr.

5. Si is, qui in integrum restitui potest, abstinuit se ab hereditate an, quamvis potest in integrum restitui, potest admitti constitutio? Ea debet addictio bonorum fieri. Quid ergo, si post addictionem libertatum conservandarum causa factam in integrum sit restitutus? Utique non erit dicendum revocari libertates, quæ semel competierunt.

5. If a person who has a right to be placed again in exactly the position he once held should abstain from taking the inheritance, is the constitution here applicable, although he may possibly be restored to his former position? Here, too, an adjudication of the goods may be made. What, then, if, after an adjudication has been made for the sake of preserving liberty, the heir is restored to his former position? The answer will be that gifts of liberty are not to be held to be revoked which have once been established.

D. xl. 5. 4. 1, 2.

The case contemplated is that of a minor under 25 years, who was *heres ab intestato*. If he had accepted the inheritance at once, he would have taken it without any of the burdens, such as gifts of liberty, with which it was charged by the testament, which had become of no effect. But if he refused to accept it, and the slaves were enfranchised by addiction being granted, then when the minor attained the age of 25, and was entitled to the *restitutio in integrum,* was the freedom gained by the slaves to be revoked? Justinian says undoubtedly not. The inheritance would be restored to the minor, but liberty once given could not be taken away again.

6. Hæc constitutio libertatum tuendarum causa introducta est: ergo si libertates nullæ sint datæ, cessat constitutio. Quid ergo, si vivus dedit libertates vel mortis causa et, ne de hoc quæratur, utrum in fraudem creditorum an non factum sit, idcirco velint addici sibi bona, an audiendi sunt? Et magis est, ut audiri debeant, etsi deficiant verba constitutionis.

6. This constitution was intended to make gifts of liberty effectual; and, therefore, when no such gifts are made, the constitution is not applicable. Suppose then a master has given freedom to his slaves by a donation either *inter vivos* or *mortis causa*, and, to prevent any question arising whether the creditors have been defrauded, the slaves intended to be enfranchised should petition that the goods of the deceased may be adjudged to them; is this to be allowed? And we think that we ought, on the whole, to say that it is, although the constitution is silent on the point.

See Bk. i. Tit. 6.

7. Sed cum multas divisiones ejusmodi constitutioni deesse perspeximus, lata est a nobis plenissima constitutio, in quam multæ species collatæ sunt, quibus jus hujusmodi

7. Perceiving that the constitution was deficient in many respects, we have published a very complete constitution, containing many provisions, which complete the legislation on this

successionis plenissimum est effectum, quas ex ipsa lectione constitutionis potest quis cognoscere.

kind of succession, and which may be easily learned by reading the constitution itself.

C. vii. 2. 15.

The chief changes made by this constitution were—1. That even if the goods had been sold by the creditors, the *addictio* might still be made within a year from the sale, which was rescinded on the applicant guaranteeing the creditors; 2. That the *addictio* might be made if the applicant offered a composition satisfactory to the creditors, instead of payment in full; 3. That some only of the slaves need be enfranchised if the property did not admit of all being enfranchised; and 4. That while, if several persons, having an equal right to apply, asked for an *addictio*, they became joint possessors of the goods; if they applied one after the other, the first applicant was preferred.

Tit. XII. DE SUCCESSIONIBUS SUBLATIS, QUÆ FIEBANT PER BONORUM VENDITIONEM ET EX SENATUSCONSULTO CLAUDIANO

Erant ante prædictam successionem olim et aliæ per universitatem successiones. Qualis fuerat bonorum emptio, quæ de bonis debitoris vendendis per multas ambages fuerat introducta et tunc locum habebat, quando judicia ordinaria in usu fuerunt: sed cum extraordinariis judiciis posteritas usa est, ideo cum ipsis ordinariis judiciis etiam bonorum venditiones exspiraverunt et tantummodo creditoribus datur officio judicis bona possidere et, prout eis utile visum fuerit, ea disponere, quod ex latioribus digestorum libris perfectius apparebit.

There were formerly other kinds of universal succession prior to that of which we have just spoken; such was the *emptio bonorum* which with numberless formalities was established for the sale of the goods of debtors. It continued while the *judicia ordinaria* were in use; but afterwards, when the *judicia extraordinaria* were adopted, the sale of goods passed away with the *judicia ordinaria*. Creditors can now do no more than possess themselves of the goods of their debtors by order of a judge, and dispose of them as they think proper. The subject will be found treated of more at length in the larger work of the Digest.

Gai. iii. 77-81; D. xlii. 5; C. vii. 72. 9.

This *bonorum emptio per universitatem*, one of the prætorian modes of execution (see Introd. sec. 108), was a transfer of the entire property of the debtor to the person who, in consideration of receiving it, would undertake to pay the largest proportion of the claims of the creditors. The creditors might apply for permission to have the goods sold in this way, not only when the debtor was dead, but (1) when he fraudulently hid himself, so that he could not be summoned before the magistrate; or (2) when he was absent, and no one appeared to defend his cause; or (3) if, after having been condemned, he did not satisfy the claims of the creditors within the time allowed by law; or (4) if he had made a *cessio bonorum*, i.e. had himself abandoned all his property to his credi-

tors, as he was allowed to do by the *lex Julia*. (GAI. iii. 78.) The *venditio bonorum* was held to carry with it the infamy of the debtor. The creditors were first placed by the prætor in possession of the property, *rei servandæ causa*, and the intended sale was announced by advertisement (*proscriptio*). This possession was continued during thirty days if the debtor was alive, and during fifteen if he was dead. The prætor then summoned a meeting of the creditors, at which they chose one of their own body to conduct the business for them, called the *magister*. Ten or five days thereafter, according as the debtor was alive or dead, the conditions of sale were fixed under the supervision of the prætor (*publicatio*). After a further delay of twenty or ten days, the goods were put up to public auction, and, the offer of the highest bidder having been accepted, the prætor made the *addictio*, by which the goods of the debtor, though not the Quiritarian ownership in them, were transferred to the *bonorum emptor*, who stepped into the place of the debtor, and might sue and be sued exactly as the debtor might have sued or been sued. (THEOPH. *Par.*; GAI. iii. 79, 80.)

Judicia ordinaria, extraordinaria. (See Introd. sec. 109.)

The process under the *judicia extraordinaria*, which is referred to in the text, was termed *distractio bonorum*. The creditors—or some of them, time being allowed for others to come in (C. vii. 72. 10. pr.)—were placed in possession of the goods generally of the debtor, and then the goods were sold, not in block to one purchaser, but separately to separate purchasers, as occasion offered. (See D. xxvii. 10. 5.)

1. Erat et ex senatusconsulto Claudiano miserabilis per universitatem adquisitio, cum libera mulier servili amore bacchata ipsam libertatem per senatusconsultum amittebat et cum libertate substantiam: quod indignum nostris temporibus esse existimantes, et a nostra civitate deleri et non inseri nostris digestis concessimus.

1. There was also, by virtue of the *senatusconsultum Claudianum*, another most wretched method of acquisition *per universitatem;* when a freewoman indulged her passion for a slave, and lost her freedom under this *senatusconsultum*, and with her freedom her estate. This was, in our opinion, unworthy of our age, and we have therefore abolished it in our empire, and forbidden it to be inserted in our Digest.

GAI. i. 84, 91, 160; C. viii. 24.

There could be no marriage between a slave and a free person. If, therefore, a woman born free lived with a slave *in contubernio*, this was thought so disgraceful to her, that if the master of the slave complained by three denunciations of her conduct, a magisterial decree subjected her to the punishment mentioned in the text, and she and her property passed to the owner of the slave. The strong expression, '*servili amore bacchata*,' must not be taken as indicating anything more than cohabitation with a slave. If the woman was a freedwoman who thus lived with a slave, she became again the slave of her patron, if he had not known of, and assented to, her conduct, and the slave of the master of the slave

with whom she lived, if the patron had been aware of how she was living. (PAUL. *Sent.* 2. 21; GAI. i. 84-86, 91, 160; see also TACIT. *Annal.* xii. 53.) The date of the *senatusconsultum Claudianum* is A.D. 52.

TIT. XIII. DE OBLIGATIONIBUS.

Nunc transeamus ad obligationes. Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.

Let us now pass to obligations. An obligation is a tie of law, by which we are so constrained that of necessity we must render something according to the laws of our state.

D. xliv. 7. 3. pr.

1. Omnium autem obligationum summa divisio in duo genera deducitur: namque aut civiles sunt aut prætoriæ. Civiles sunt, quæ aut legibus constitutæ aut certe jure civili comprobatæ sunt. Prætoriæ sunt, quas prætor ex sua jurisdictione constituit, quæ etiam honorariæ vocantur.

1. The principal division of all obligations is into two kinds, for they are civil or prætorian. Civil obligations are those constituted by the laws, or, at least, recognised by the civil law. Prætorian obligations are those which the prætor has established by his own authority; they are also called honorary.

D. xliv. 7. 52. pr. 5, 6.

2. Sequens divisio in quattuor species deducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio. Prius est, ut de his, quæ ex contractu sunt, dispiciamus. Harum æque quattuor species sunt: aut enim re contrahuntur aut verbis aut litteris aut consensu. De quibus singulis dispiciamus.

2. A further division separates them into four kinds, for they arise *ex contractu* or *quasi ex contractu, ex maleficio* or *quasi ex maleficio.* Let us first treat of those which arise from a contract: which again are divided into four kinds according as they are formed *re, verbis, litteris*, or *consensu.* Let us examine each kind separately.

GAI. iii. 88, 89; D. xliv. 7. 1. pr. and 1.

We now pass to obligations. Having finished the subject of rights over things, and of the modes in which they are acquired, we now pass to rights against particular persons, *jura in personam*, expressed very inaccurately in later Latin by the term *jura ad rem.* These rights are those which we have against some one or more particular persons, as opposed to the general rights, such as that of having the secure enjoyment of our property, which we have against all mankind. (See Introd. sec. 61.)

Obligations are placed in the Institutes between the subject of things and the subject of actions; and as in Bk. i. (Tit. 2. 12) it is said that the whole of private law relates to persons, things and actions, it has been questioned whether obligations are meant to be included under things or actions. Theophilus understood them to be included under actions, as we see by his paraphrase on this Title, and on the sixth Title of the Fourth Book; but it is evident that Gaius, from whom Justinian borrows the arrangement, meant obligations to come under the discussion of *res;*

otherwise, as Savigny remarks (*System des heut. röm. Rechts*, Bk. ii. ch. 1), we must consider the part specially relating to actions as a subsidiary part of the portion commencing with obligations, which is contradicted by the mode in which Gaius treats of the subject of actions. The subject of obligations does not properly fall under either *res* or *actiones*, and it was from feeling this that Gaius placed it between the two, although his division of law obliged him to rank it under one or the other. He could not, consistently with this division, place obligations in his system according to their nature, and he preferred to consider them with reference to their ultimate result (*res*) rather than with reference to the mode by which the law secured this result (*actio*). The incorrectness of such a mode of treating obligations, and the inaccuracy of the expression *jus ad rem*, are evident when we consider that the *actio* did not really give the *res* which was the subject of the obligation, but only a pecuniary equivalent.

The remainder of this Book and the first five Titles of the Fourth Book must be taken together as treating of obligations, the remainder of this Book being mainly devoted to one head of obligations, those arising from contract. As a preliminary to the general study of the part of the Institutes treating of obligations, and specially to the study of contracts, it will be convenient here to take a preliminary survey of some points to which constant reference is made in the discussion of subsequent details.

These points are: 1. The meaning of the term *obligatio*. 2. The sources of obligations. 3. The obligations which arise from contract, and their recognised heads. 4. Innominate contracts, pacts, natural obligations. 5. *Culpa*. 6. Interest. 7. The actions by which obligations, and especially contracts, were enforced.

1. *The Meaning of the Term Obligatio.*—*Obligatio*, as the text in the initial paragraph tells us, is a 'tie of law by which we are so constrained that of necessity we must render something according to the laws of our state,' i.e. the rules of either the strict civil law or the prætorian law. It was because it could be enforced by an action that the tie was binding on the person bound, *debitor* (*debitor intellegatur is a quo invito exigi pecunia potest*, D. l. 16. 108), in favour of the *creditor*, these words *debitor* and *creditor* being used in a general sense, in Roman law, for the person bound and the person profiting by the tie. That which the debtor is thus bound to render is in the text expressed by the general word *solvere;* and this general term includes three kinds of such rendering—*dare, facere, præstare*. *Dare* meant to give either the property in a thing, as in the contract of *stipulatio*, or only the possession of it, as in the case of the seller in the contract of sale; *facere*, to do something, as, for example, the mandatary or agent had to do what he had undertaken to do; and *præstare*, to make good, as the person guilty of negligence had *præstare culpam*, to make good his fault. These three terms, however, were not kept distinct, *facere* and *præstare* being constantly used in the sense

of *dare*. In every case, however, it was a sum of money that was the real thing that the debtor was forced to give, as the remedy for every breach of contract was put into the shape of a pecuniary equivalent, unless the debtor could and did execute his contract under compulsion.

Obligatio is thus properly the tie between creditor and debtor; but it is also used to express the right thus gained (D. xii. 2. 9. 3), the duty thus owed (D. l. 16. 21), and also one mode by which such a tie is created, being used as equivalent to *contractus*. (D. v. 1. 20.)

2. *The Sources of Obligations.*—The two main sources of obligations are contracts and delicts: the debtor is bound by having undertaken to be bound, or he has done an injury and has to make good his wrong. Contracts are the principal subject of the remainder of this Book, and delicts of the first Titles of the Fourth Book. But there were obligations which arose in a manner very similar to that from which contracts sprang, a state of facts having arisen by which the debtor was placed in very much the position in which he would have been had he contracted—*obligationes quasi ex contractu*, treated of in the 27th Title of this Book; and there were obligations which arose from wrongs being done, which did not fall within the special list of delicts known to Roman law—*obligationes quasi ex delicto*, treated of in Title 5 of the Fourth Book. The sources of obligations in the Institutes are thus four; while Gaius says (iii. 88), *omnis obligatio vel ex contractu nascitur, vel ex delicto*, and adds in a passage given in the Digest (xliv. 7. 1. pr.), *aut proprio quodam jure ex variis causarum figuris*, i.e. by obligations *quasi ex contractu* and *quasi ex delicto*.

3. *Contracts.*—A contract is a species of agreement, the accord of two wills, *conventio, pactum;* and in an agreement there is first of all the *pollicitatio*, the offer made by one party, and then the acceptance by the other. When this accord of wills is such that the law adds a third element, the *vinculum juris*, or obligation, we have a contract. (D. l. 12. 3. pr.) But in order that this third element should be added, it was, according to the strict theory of Roman law, necessary that the accord of wills should have been expressed in a particular manner. In the old times of Roman law, the *nexum*, the form of conveyance by the scales and the copper, was the chief and, perhaps, the only form of contract recognised, and the use of this form continued to be necessary to pass *res mancipi*. (See Introd. sec. 59.) Possibly stipulations also dated from the earliest time of Roman law (HUNTER, 364-8), but at any rate there were gradually recognised in Roman law the following forms by which contracts could be made: 1. *Verbis*, by the stipulation. 2. *Litteris*, by entry in a ledger. 3. Then, without any special form being gone through, contracts were recognised when made *re*, by the simple delivery of a thing in one of four ways, *mutuum, commodatum, depositum, pignus*. And, lastly, 4. In four cases contracts were recognised as arising immediately

out of the consent of the parties: sale, letting on hire, partnership, *mandatum*. There were thus ten recognised heads of contract. The Institutes, following Gaius, treat first of contracts *re*, although this is out of the historical order, then the formal contracts *verbis* and *litteris*, and lastly the formless contracts *consensu*. It may be observed that contracts *re* may in one way be classed with contracts *verbis* and *litteris*, and opposed to the consensual contracts; for in contracts *re* there is something, i.e. the delivery of the thing, as in contracts *verbis* and *litteris* there is something, i.e. the use of a form, beyond the mere consent.

By an obligation the debtor is bound to the creditor; but an obligation might either be such as to bind one party, the debtor, and not the other, the creditor (unilateral contracts), or it might be such that each party was in turn debtor and creditor (bilateral contracts). Contracts made *verbis* and *litteris* were unilateral. Among contracts made *re*, the contract of *mutuum* was unilateral. The contracts of *commodatum*, *depositum*, and *pignus* were so far bilateral that the person to whom the thing was delivered might recover extraordinary outlay incurred in preserving or maintaining the thing, or caused by the fault of the other person to the contract. It was much in the same sense that the consensual contract of *mandatum* was bilateral. The other three consensual contracts were always bilateral. An essential feature of the three contracts, *commodatum*, *depositum*, and *mandatum*, was that they were always gratuitous. Contracts again may be regarded as they are executed or executory—that is according as something must have been done in accomplishment of the contract at the time of making it, or as the liabilities of both parties might be altogether prospective. Contracts *re* belong to the former head; contracts *verbis* and *consensu* to the latter. Contracts *litteris* were, properly, executed, but were so used as to be executory.

4. *Innominate Contracts.*—When an agreement did not take the shape of any of the ten forms of contract recognised in the civil law (it will be remembered that the heads *re* and *consensu* have each four subdivisions), it was, strictly speaking, not a contract at all, but if one party to it had executed it, the prætor would force the other party to execute it also. These contracts, as having no special name, have been termed *contractus innominati*, and as the contract sprang into existence by a thing having been done or given, by the fact, that is, of the contract being already executed by one party to it, these *contractus innominati* may be looked on as belonging more immediately to the head of contracts made *re*. Paulus (D. xix. 5. 5. pr.) thus sums up the heads of the cases in which such contracts might arise: '*Aut do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias*'. I give something to you in such a way that by the fact of my gift (*re*) you are bound to give something to me, or I give so that you are bound to do something for me, or I do something for you so that you are bound to give me something, or I do something for you so that you are

bound to do something for me. Contracts of this sort would be enforced by an *actio in factum præscriptis verbis*, by one, that is, in which the formula would be arranged to meet the circumstances of this particular case (*in factum*), a short statement of these circumstances being placed in the *demonstratio* (*præscriptis verbis*).

Pacts.—An agreement, *pactum*, not coming under the ten heads of contract, nor binding as an innominate contract by having been executed on one side, was, as a general rule, a *nudum pactum;* that is, it could not be enforced by an action. But such an agreement might be used as the basis of an exception. (See Bk. iv. Tit. 13.) *Nuda pactio obligationem non parit, sed parit exceptionem.* (D. ii. 14. 7. 4.) There were, however, some pacts to which an action was attached, either by express enactment, *pacta legitima*, such as, after the time of Justinian, the agreement to give (Bk. ii. Tit. 7. 2), or by the prætors (*pacta prætoria*), such as the *pactum constitutæ pecuniæ*, an agreement by which a person agreed to pay what he already owed. (Bk. iv. Tit. 6. 9.) *Pacta* might also be added (*adjecta*) as subsidiary to a main obligation.

Natural Obligations.—There were certain ties to which no action was attached, but which still were not without a recognised legal force, because of the moral claim to recognition they involved. They were called natural obligations. As for example, if an agreement was made between a *paterfamilias* and any one in his power, this was not an obligation that could be legally enforced, but the parties were bound by a tie which the jurists ascribed to the sphere of the *lex naturæ* or *jus gentium*. *Is natura debet quem jure gentium dare oportet, cujus fidem secuti sumus.* (D. l. 17. 84. 1.) The principal effects of natural obligations were, that if money was paid in pursuance of them it could not be sued for back (D. xii. 6. 19. pr.), and they could be made the subject of a set-off in an action brought to enforce a legal obligation: *etiam quod natura debetur venit in compensationem.* (D. xvi. 2. 6.) Pacts probably were considered to produce always a natural obligation; but a natural obligation might arise in cases where there was no pact, no agreement, for example, of persons able to contract, as, if a thing was due from a slave, the slave could not bind himself, but after he became free, the thing was due by a natural obligation (D. xliv. 7. 14), and a suretyship could be created to give effect to it. (Tit. 20. 1.)

5. *Culpa, dolus, diligentia.*—One of the varying features in obligations which it is of considerable importance to notice is the amount of responsibility thrown on one or both of the parties to it.

If one person who was bound to another by a contract, designedly subjected him to harm or loss (*damnum*) with respect to anything included in the contract, the wrongdoer, in inflicting this wilful injury, was said to be guilty of *dolus;* if he was the means of an injury not designed being inflicted, then, unless the *damnum* was

the result of unavoidable accident, he was said to be guilty of *culpa*. The technical term for being responsible for malicious injury or a fault was *dolum, culpam præstare*. Every contract bound all parties *dolum præstare*, and a special agreement that the parties should not be so bound was void. (D. ii. 14. 27. 3.) *Culpa* would naturally admit of degrees. The fault might be one which any man in his senses would have scrupled to commit, and it was then termed *lata culpa* (*lata culpa est nimia negligentia, id est, non intellegere quod omnes intellegunt;* D. l. 16. 213. 2); and *lata culpa* was treated as approaching nearly to *dolus*, as such extreme negligence must generally be due to design. Or it might consist in falling short of the highest standard of carefulness to avoid injury that could be found; such, for instance, as the carefulness employed in the management of affairs by a person who would deserve to be called *bonus paterfamilias*, and the *culpa* was then termed *levis* or *levissima*. Or, again, it might consist in falling short of the care which the person guilty of the *culpa* was accustomed to bestow on his own affairs. In this last case we no longer measure by an absolute standard, but a relative one; what is *culpa* in one man is not in another, and modern writers have therefore spoken of it as being *culpa levis in concreto*, i.e. as seen in and measured by the particular individual, opposed to the *culpa levis in abstracto*, i.e. estimated by the absolute standard of the diligence which a person of the utmost care would exhibit.

If we measure the degrees of responsibility which under various circumstances those bound by an obligation will incur, we may speak either of the fault for which they will be held responsible, or of the degree of negligence which this fault implies, or of the degree of diligence that is exacted from them. These are only different modes of talking of the same thing. If the circumstances are such that the person bound by the obligation undergoes a slight degree of responsibility, we may say that he will be responsible for a grave fault (*lata culpa*), not for a slight one (*culpa levis*), that the negligence for which he will be responsible must be gross, *crassa*, or that the diligence he has to show is of the second, not of the first, of the two orders to be mentioned immediately. It is in the language of diligence that the Roman jurists generally calculate the amount of responsibility. They make two orders of diligence, the higher, that of the *bonus paterfamilias, exacta diligentia,* and the lower, that shown by the person spoken of in the conduct of his own affairs, *quanta in suis rebus diligentia;* and these two orders of diligence are brought into harmony with the three divisions of *culpa* (*lata, levis,* and *levis in concreto*) in this way. (1) A person responsible for *culpa levis in abstracto* has to show the diligence of a *bonus paterfamilias*. (2) A person who is only responsible for *lata culpa* is not to be held liable until it is shown that he has not used as much care as he does habitually about his own things. A person who is responsible for *culpa levis in concreto* has to show that he has used as much care as he does about

his own things, i.e. in this case the burden of proof is on him. In each case the standard is the care which the person sought to be made liable takes about his own things. All responsibility for *culpa* is thus set under two heads of diligence, and in the same way there are two corresponding heads of negligence ; and negligence has a distinguishing mark added to it in the term *crassa*, as opposed to slight (*minima*), when it is meant that the person spoken of has not used in the case in question the care he habitually employs in matters that affect him.

The higher degree of diligence, that of a *bonus paterfamilias*, was required, or, in other words, the negligence from which liability would arise need not be *crassa*, or, in other words, the *culpa* causing liability might be *levis* and *levis in abstracto*, in the following set of cases: 1. Where the person responsible got the benefit of a contract, as, for example, when he borrowed a thing for his own use (*commodatum*). 2. When both parties were interested in the obligation being carried out, but there was no joint interest in the thing, as, for example, mortgagor and mortgagee (Tit. 14. 4), vendor and vendee (D. xviii. 6. 3), letter and hirer (D. xix. 2. 25. 7). 3. In case of agents (*negotiorum gestores*) (Tit. 27. 1).

Only the lower degree of diligence, that *quanta in suis rebus*, was required, or, in other words, the negligence from which liability would arise must be *crassa*, or, in other words, the *culpa* causing liability might be *lata* or *levis in concreto*, in the following cases: 1. When the other person to the contract got the benefit from it, as in a contract of deposit, the depositary is only liable for *crassa negligentia*, and it must be proved that he has not used the *quanta in suis rebus diligentia*. (D. xvi. 3. 32.) 2. When both parties to the contract have a common interest in the thing as to which the question of diligence or negligence arises, as partners, the husband in the management of the dotal estate, where he is a sort of partner (D. xxiii. 3. 17. pr.), co-heirs and co-legatees (D. x. 2. 25. 16). 3. Involuntary parties to a *quasi* contract, like tutors and curators (D. xxvii. 3. 1. pr.).

6. *Interest, mora.*—When a person bound by a contract delayed to execute it, and this delay (*mora*) was of such a kind that *culpa* could be imputed to him, he was subjected to something more than the necessity of fulfilling the contract, and especially he was in most cases liable to pay interest (*usuræ*). (D. xxii. 1. 7.) But interest was not ordinarily payable on debts except by express agreement. By the Twelve Tables there was fixed a legal maximum of 12 per cent. per annum, or 1 per cent. per month, *centesimæ usuræ*. It was afterwards reduced to 6 per cent., and by the *lex Genucia* (B.C. 341) interest was declared illegal. During the Republic, however, it was again recognised, and the maximum once more rose to 12 per cent. Justinian fixed a maximum varying according to circumstances from 12 to 4 per cent. (C. iv. 32. 26.)

7. *Actions.*—The subject of actions is treated of fully in the sixth and following Titles of the Fourth Book, and it is only neces-

sary here to notice generally that part of the subject which has to do with the enforcement of obligations, and especially of contracts. As an obligation was constituted a legal tie by having an action attached to it, it is necessary to know by what kind of action different obligations were enforced, and in almost every case the Institutes couple the mention of the kind of action attached with the mention of each kind of obligation. The main distinction to be now referred to is that between condictions and *bonæ fidei* actions, corresponding with the distinction noticed in Tit. 13. 1 between civil and prætorian obligations.

The older actions of law (see Introd. sec. 94) afforded a very cumbrous machinery for the enforcement of rights against particular persons; and the *lex Silia* (B.C. 243) introduced a new kind of action, termed *condictio*, for the enforcement of obligations binding a person to give the absolute ownership (*dare*) of a certain sum of money (*pecunia certa*); and the *lex Calpurnia* (B.C. 233) extended its application to a similar demand of any certain thing, as a definite quantity of oil or wheat. (GAI. iv. 19.) In process of time the *condictio* was made to embrace uncertain as well as certain things, and was applied to obligations binding a person *facere*, and hence Gaius says, *appellantur in personam actiones, quibus dari fierive oportere intendimus, condictiones* (iv. 5). The *condictio certi*, i.e. the *condictio* in its older and stricter form, came thus to be opposed to the *condictio incerti*. We may therefore say that contracts *dare* or *facere* were enforced by a *condictio*, and that this *condictio* was *certi* or *incerti* according as a definite or indefinite thing was demanded. Whenever the contract was to do a thing, it was always uncertain, because the law could not compel the personbound by the contract to do the thing, but only to give a pecuniary equivalent; and what sum of money was a reasonable compensation for the loss sustained by the thing not being done was left to be settled by the judge. The formula of the *condictio certi* ran *si paret eum [decem aureos] dare oportere.* (See paragr. 1. of next Title.) That of the *condictio incerti* ran *quicquid paret eum dare facere oportere.* The *condictio incerti*, besides its general name, received also a special name derived from the kind of contract it was brought to enforce, or from the subject matter of the contract itself. For instance the action brought to enforce a stipulation for an uncertain sum was termed an *actio ex stipulatu.* When the *condictio* was *certi*, it was generally spoken of simply as *condictio.* Sometimes, however, though more rarely, it too received a special name, as the *condictio certi* brought to enforce a *mutuum* sometimes termed the *actio mutui.*

There was another class of actions in which a wide discretion was given to the judge, who was to take all the circumstances of the case into his consideration, and pronounce the sentence which equity demanded, thus acting as an *arbiter* rather than as a *judex.* Such actions were termed *bonæ fidei actiones*, and the obligations, to

enforce which they were given, were termed *bonæ fidei obligationes*. The right to have this equitable consideration of the whole case was inherent in the nature of the obligation, i.e. the action brought to enforce any of the *bonæ fidei obligationes* was always *bonæ fidei*. All actions instituted by the prætorian law were of this description. There was thus an opposition made between *condictiones* which were *stricti juris*, derived from the civil law, and in which the judge was confined within the limits of the formula, and these *bonæ fidei actiones*. Among the *bonæ fidei actiones* we shall find several mentioned in the following Titles of this Book, as, for instance, the action *ex empto*, *ex vendito*, *ex locato*, *ex conducto*, *mandati*, *depositi*, *pro socio*, &c. (See Bk. iv. Tit. 6. 28.) The *bonæ fidei* action given by the prætor to enforce innominate contracts was almost always one specially adapted to meet the facts of the particular case, and it received the name of the *actio in factum præscriptis verbis*. The formula was drawn up to meet the facts of the particular case (*in factum*), and this was done by placing in the *demonstratio* a short statement of these facts (*præscriptis verbis*). (See Introd. sec. 106.)

TIT. XIV. QUIBUS MODIS RE CONTRAHITUR OBLIGATIO.

Re contrahitur obligatio veluti mutui datione. Mutui autem obligatio in his rebus consistit, quæ pondere, numero mensurave constant, veluti vino, oleo, frumento, pecunia numerata, ære, argento, auro, quas res aut numerando aut metiendo aut adpendendo in hoc damus, ut accipientium fiant et quandoque nobis non eædem res, sed aliæ ejusdem naturæ et qualitatis reddantur. Unde etiam mutuum appellatum sit, quia ita a me tibi datur, ut ex meo tuum fiat. Ex eo contractu nascitur actio, quæ vocatur condictio.

An obligation is contracted *re*, as, for example, by giving a *mutuum*. This always consists of things which may be weighed, numbered, or measured, as wine, oil, corn, coin, brass, silver, or gold. In giving these things by number, measure, or weight, we so give them that they may become the property of those who receive them. And identical things lent are not returned, but only others of the same nature and quality; and hence the term *mutuum*, because what I give, from being mine, becomes yours. From this contract arises the action termed *condictio*.

GAI. iii. 90; D. xii. 1. pr. 1, 2.

Obligations were said to be contracted *re* when the actual receipt of a thing under certain conditions imposed the necessity of fulfilling those conditions. Four kinds of contracts came under this head, all of which are noticed in this Title, viz. those named *mutuum*, *commodatum*, *depositum*, and *pignus*. By the contract of *mutuum* the property in the thing delivered passed to the receiver; by that of *pignus* the recipient acquired possession; in contracts of *commodatum* and *depositum* the recipient was only *in possessione*. (See Bk. ii. Tit. 6. pr. note.)

The contract of *mutuum* was a contract of loan, where not the thing lent, but an equivalent, was to be returned. The obligation to return this equivalent arose on and by the delivery of the thing

lent. It is scarcely necessary to say that the derivation from *ex meo tuum* is quite erroneous. Things which were of such a nature that they could be replaced by equal quantities and qualities are termed, in barbarous Latin, *fungibiles*, because *mutua vice funguntur* (D. xii. 1. 6), they replace and represent each other: thus a bushel of wheat is said to be a *res fungibilis*, a particular picture is not. The distinction is much better expressed by saying that the classes of things which can represent each other are considered *in genere*, those which cannot are considered *in specie*. (See Introd. sec. 55.) If the person who lends the bushel of wheat receives in return a bushel of equally good wheat, consisting of grains totally different from those he lent, it is the same to him as if the identical grains were restored; the wheat may be considered *in genere;* not so with the picture, which can only be considered *in specie*. But it is to be observed that it is the intention of the parties, not the nature of the thing, that makes the thing considered *in genere* rather than *in specie*. A person might lend a picture, and only require that a picture of some sort, whether the same picture or another, should be given in return to him, in which case the picture would be considered *in genere;* or a person might require the identical grains of wheat to be returned, and then the wheat would be considered *in specie*. A thing lent in a *mutuum* was always considered *in genere*, so that whenever it was the intention of the parties that the loan should be a *mutuum*, it was also their intention that the thing lent should be considered *in genere*.

It was by the contract of *mutuum* that money was generally lent, and so we are told in Bk. iv. Tit. 7. 7, that persons who lent money (*mutuas pecunias*) to *filiifamiliarum* were deprived by the *senatusconsultum Macedonianum* of all power to recover the debt.

The action for recovering the equivalent would be a *condictio certi*, as the equivalent was necessarily something fixed and determined on. In this case the *condictio* received the name of *condictio ex mutuo*, or sometimes *actio mutui*, but as it was always *certi*, it very seldom was termed anything but *condictio*, and perhaps the term *actio mutui* (C. vii. 35. 5) would not have been used in the time of strict legal language.

1. Is quoque, qui non debitum accepit ab eo, qui per errorem solvit, re obligatur: daturque agenti contra eum propter repetitionem condicticia actio; nam proinde ei condici potest 'si paret eum dare oportere,' ac si mutuum accepisset. Unde pupillus, si ei sine tutoris auctoritate non debitum per errorem datum est, non tenetur indebiti condictione, non magis quam mutui datione. Sed hæc species obligationis non videtur ex contractu consistere, cum is, qui

1. A person, also, who receives a payment which is not due to him, and which is made by mistake, is bound *re;* and the plaintiff may have against him an *actio condicticia* to recover what he has paid. For the *condictio 'Si paret eum dare oportere'* may be brought against him, exactly as if he had received a *mutuum*. Thus a pupil, to whom a payment has been made by mistake without the authorisation of his tutor, is not subject to a *condictio indebiti*, any more than he would be

solvendi animo dat, magis distrahere voluit negotium quam contrahere.

by the gift of a *mutuum*. This species of obligation, however, does not seem to arise from a contract, since he, who gives in order to acquit himself of something due from him, intends rather to dissolve than to make a contract.

GAI. iii. 91.

In this case it is the law that imposes certain conditions, and not the intention of the parties, and therefore the obligation arises *quasi ex contractu*, under which head it is, indeed, subsequently placed. (Tit. 27. 6.) A pupil could not be bound without the consent of his tutor. If, therefore, without the consent of his tutor, a loan was made him, he was not bound to repay it, or if money not due to him was paid him, he was not bound to refund it. (See Bk. i. Tit. 21. pr.)

2. Item is, cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. Sed is ab eo, qui mutuum accepit, longe distat: namque non ita res datur, ut ejus fiat, et ob id de ea re ipsa restituenda tenetur. Et is quidem, qui mutuum accepit, si quolibet fortuito casu, quod accepit, amiserit, veluti incendio, ruina, naufragio aut latronum hostiumve incursu, nihilo minus obligatus permanet. At is, qui utendum accepit, sane quidem exactam diligentiam custodiendæ rei præstare jubetur nec sufficit ei, tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est, si modo alius diligentior poterit eam rem custodire: sed propter majorem vim majoresve casus non tenetur, si modo non hujus culpa is casus intervenerit: alioquin si id, quod tibi commodatum est, peregre ferre tecum malueris et vel incursu hostium prædonumve vel naufragio amiseris, dubium non est, quin de restituenda ea re tenearis. Commodata autem res tunc proprie intellegitur, si nulla mercede accepta vel constituta res tibi utenda data est. Alioquin mercede interveniente locatus tibi usus rei videtur: gratuitum enim debet esse commodatum.

2. A person, too, to whom a thing is given as a *commodatum*, i.e. is given that he may make use of it, is bound *re*, and is subject to the *actio commodati*. But there is a wide difference between him and a person who has received a *mutuum;* for the thing is not given him so that it may become his property, and he therefore is bound to restore the identical thing he received. And, again, he who has received a *mutuum*, if by any accident, as fire, the fall of a building, shipwreck, the attack of thieves or enemies, he loses what he received, still remains bound. But he who has received a thing lent for his use, is indeed bound to employ the utmost diligence in keeping and preserving it; nor will it suffice that he should take the same care of it, which he was accustomed to take of his own property, if it appears that a more careful person might have preserved it in safety; but he has not to answer for loss occasioned by superior force, or extraordinary accident, provided the accident is not due to any fault of his. If, however, you take with you on a journey the thing lent you to make use of, and you lose it by the attack of enemies or robbers, or by shipwreck, you are undoubtedly bound to restore it. A thing is properly said to be *commodatum*, when you are permitted to enjoy the use of it without any recompense being given or agreed on; for, if there is any recompense, the contract is that of *locatio*, as a thing, to be a *commodatum*, must be lent gratuitously.

D. xliv. 7. 1. 3, 4; D. xiii. 6. 18. pr.

As the advantage is, in almost every case, entirely on the side of the receiver of the *commodatum*, he was bound to take every care of it, or, as Gaius says, as great care as the most diligent *paterfamilias* takes of his own property. (D. xiii. 6. 18. pr.)

To use the technical phrase, it was 'essential' to the *commodatum* that it should be gratuitous. Things incident to a contract may be *essential* to it, i.e. necessarily belonging; *natural*, i.e. belonging in the absence of express agreement to the contrary; or *accidental*, i.e. belonging only by express agreement.

The *commodatum* gave rise to the *actio commodati*, which was either *directa* or *contraria*; by the *actio commodati directa*, the *commodans* made the receiver of the *commodatum* restore the thing lent, after the receiver had had it in his possession for the time agreed on (for he could not reclaim it before), or made him pay for any loss accruing through his fault. By the *actio commodati contraria*, the receiver of the *commodatum* obtained from the *commodans* compensation for any extraordinary expenses which the preservation of the thing had entailed, or for any losses occasioned by the fault of the *commodans*. The *actio* was, in the former case, termed *directa*, because it proceeded from what was a necessary part of the execution of the contract, viz. the thing lent being put in the possession of the receiver, while the *actio contraria* only arose from a thing which might happen or not, viz. there being some extraordinary expense, or some fault on the part of the *commodans*. (See D. xiii. 6. 17. 1.) All the actions arising out of contracts *re*, except the *condictio ex mutuo*, were *bonæ fidei*. (Bk. iv. Tit. 6. 28.)

3. Præterea et is, apud quem res aliqua deponitur, re obligatur et actione depositi, qua et ipse de ea re, quam accepit, restituenda tenetur. Sed is ex eo solo tenetur, si quid dolo commiserit, culpæ autem nomine, id est desidiæ atque neglegentiæ, non tenetur: itaque securus est, qui parum diligenter custoditam rem furto amisit, quia, qui neglegenti amico rem custodiendam tradidit, suæ facilitati id imputare debet.

3. A person, again, with whom a thing is deposited, is bound *re*, and is subject to the *actio depositi*, by which he is bound to give back the identical thing which he received. But he is only answerable if he is guilty of fraud, and not for a mere fault, such as carelessness or negligence; and he cannot, therefore, be called to account if the thing deposited, being carelessly kept, is stolen. For he who commits his property to the care of a negligent friend, should impute the loss to his own want of caution.

D. xliv. 7. 1. 5.

Here the benefit is entirely on the side of the person who commits the thing to the care of one who receives it gratuitously. The latter, therefore, unless he specially agrees to be answerable for the thing entrusted to him, or himself offers to take care of it (D. xiii. 6. 5. 2), is not liable for its loss or deterioration, if he is not guilty of dishonesty, or of such gross neglect as amounts to dishonesty. He has, however, no right to make use of the thing, and would be guilty of theft if he did (Bk. iv. Tit. 1. 6); and as it is

deposited for the benefit of the person depositing it, that person can reclaim it when he pleases, and need not, like the *commodans*, wait for the expiration of the time agreed on.

The *depositum* gave rise to the *actio depositi*, which was *directa* or *contraria*, upon the same principle as the *actio commodati*. The depositary was entitled to be recompensed for every expense incurred, and to compensation for every loss occasioned by the fault of the *deponens*, however light that fault might be. If the depositary had voluntarily offered to receive the deposit, he too would be answerable for loss occasioned by a *culpa levis*, i.e. a slight fault, as opposed to *culpa lata*, gross negligence. If a deposit was rendered necessary by circumstances of unforeseen and sudden misfortune, as a shipwreck or fire, and if the depositary who had received the thing denied he had received it, double the value of the thing could be recovered. (See. Bk. iv. Tit. 6. 23.)

4. Creditor quoque, qui pignus accepit, re obligatur, qui et ipse de ea ipsa re, quam accepit, restituenda tenetur actione pigneraticia. Sed quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum, placuit sufficere, quod ad eam rem custodiendam, exactam diligentiam adhibere: quam si præstiterit et aliquo fortuito casu rem amiserit, securum esse nec impediri creditum petere.

4. A creditor also, who has received a pledge, is bound *re*, for he is obliged to restore the thing he has received, by the *actio pigneraticia*. But, inasmuch as a pledge is given for the benefit of both parties, of the debtor that he may borrow more easily, and of the creditor that repayment may be better secured, it has been decided that it will suffice if the creditor employs the utmost degree of diligence in keeping the thing pledged; but if, notwithstanding this care, he has lost it by some accident, the creditor is not accountable for it, and he is not prohibited from suing for his debt.

D. xliv. 7. 1. 6; D. xiii. 7. 13. 1.

The oldest form of the contract of pledge was that of *mancipatio*, or absolute sale of the thing subject to a contract of *fiducia* or agreement for redemption. There were so many things to which *mancipatio* was considered inapplicable, that the more simple contract of *pignus* quite superseded this *mancipatio contracta fiducia*. A further simplification of the contract of pledge was the *hypotheca*, in which the thing pledged remained with the pledger. The *mancipatio*, it may be observed, transferred both the property and possession of the thing pledged; the *pignus* gave the possession to the creditor, but left the property in the thing with the debtor; the *hypotheca* left both the property and the possession with the debtor. (See note at end of Bk. ii. Tit. 5.) The right of the creditor over the thing pledged or hypothecated was protected by the *actio quasi-Serviana* (see Bk. iv. Tit. 6. 7), by which the creditor recovered the thing pledged if lost out of his possession, and got possession of the thing hypothecated.

According to the text the degree of diligence required both of the *commodatarius* and of the creditor is that described as '*exacta*' That is to say the utmost diligence, that of the *bonus paterfamilias*. This view of the state of the law with regard to the creditor is

borne out in D. xiii. 7. 13. § 1 and 14, though in D. xvi. 6. 18 only the diligence '*ut in suis rebus*' is required. The creditor, like the receiver of a *commodatum*, could not make use of the thing placed in his possession; and although he could without agreement take them as against the principal of his claim (C. iv. 24. 1), it was only by an agreement, expressed or understood, that the creditor could take the fruits of the thing pledged by way of interest. (D. xx. 1. 11. 1; D. xx. 2. 8.)

Creditor and debtor are terms used more widely in Roman law than in our own. Every one who possessed a personal right against another was termed a *creditor*, and every one who owed the satisfaction of a claim, or was the subject of a personal right, was a *debitor*.

From the contract of *pignus* sprang the *actio pigneraticia*, which was *directa* when used by the debtor to constrain the creditor to give back the thing pledged if the debt had been paid, or to pay over the surplus if the thing pledged had been sold, and produced more than was due for the debt, or to obtain compensation from him for any injury to the thing pledged, arising through his fault. The *actio pigneraticia* was *contraria* when used by the creditor to make the debtor reimburse him for all expenses incurred in keeping the thing safe, or compensate him for all injuries sustained by the thing pledged through the fault of the debtor (D. xiii. 7. 31); or, again, to compensate him if the thing pledged proved to be in reality not the property of the debtor, and was claimed by the real owner. Until it was claimed, the fact that it belonged to another did not prevent a thing being made the subject of a contract of *pignus*, and the creditor was as much bound to restore it to the debtor, if the sum due was paid, as if it had really been the debtor's property.

Tit. XV. DE VERBORUM OBLIGATIONE.

Verbis obligatio contrahitur ex interrogatione et responsione, cum quid dari fierive nobis stipulamur. Ex qua duæ proficiscuntur actiones, tam condictio, si certa sit stipulatio, quam ex stipulatu, si incerta. Quæ hoc nomine inde utitur, quia stipulum apud veteres firmum appellabatur, forte a stipite descendens.

An obligation *verbis* is contracted by means of a question and an answer, when we stipulate that anything shall be given to or done for us. It gives rise to two actions—the *condictio*, when the stipulation is certain, and the *actio ex stipulatu*, when it is uncertain. The term stipulation is derived from *stipulum*, a word employed by the ancients to mean 'firm,' and coming perhaps from *stipes*, the trunk of a tree.

D. xliv. 7. 1. 7; D. xii. 1. 24.

The *stipulatio* was, properly speaking, not a contract, but a means of making a contract, a solemn form giving legal validity to an agreement. This form consisted of a question and answer, and it was the question only which was, properly speaking, the *stipu*-

latio, it being only by an extension of the term that the word was applied to the whole mode of contracting, and that the answerer as well as the questioner was said, as in paragr. 1, to be one of the *stipulantes*. Like all the old forms of obligation, this formula only bound one party, viz. the maker of the promise. The *promissor* had himself to become the *stipulator*, and to receive in his turn a promise, if he wished to secure reciprocal rights. Obligations may be divided according as they are *unilateral* and bind one party only, or *bilateral* and bind both parties. A stipulation gave rise to a unilateral obligation.

Festus derives *stipulatio* from *stips*, coined money; and Isidorus from *stipula*, a straw. '*Veteres enim, quando sibi aliquid promittebant, stipulam tenentes frangebant, quam iterum jungentes sponsiones suas agnoscebant.*' (*Orig.* v. 24. Quoted by Ortolan.) *Stipes* and *stipulum* are a more probable source of the derivation of the word.

When the stipulation was for something certain, as for a fixed sum of money, or for wine of a specified kind, it was enforced by the *condictio certi;* when for something uncertain, as for wine of a good quality, for something to be done or left undone, by the *condictio incerti*. The term *actio ex stipulatu* is sometimes used to denote the *condictio*, whether *certi* or *incerti*, but it is more usually employed to denote the *condictio incerti*, as when the *condictio* was *certi*, that is, was employed in its proper form, it generally received no other name than *condictio*. The action arising on a stipulation of any kind was always *stricti juris*.

The stipulation was not the only contract made by going through a solemn form of words. By the *dictio dotis* the wife and her ascendants bound themselves to give the *dos* to the husband; and by a promise accompanied by an oath (*jurata promissio liberti*) the freedman bound himself to render his services to his patron. In neither of these cases, however, was a previous question a necessary part of the form.

1. In hac re olim talia verba tradita fuerunt: 'Spondes? spondeo, Promittis? promitto, Fidepromittis? fidepromitto, Fidejubes? fidejubeo, Dabis? dabo, Facies? faciam.' Utrum autem Latina an Græca vel qua alia lingua stipulatio concipiatur, nihil interest, scilicet si uterque stipulantium intellectum hujus linguæ habeat: nec necesse est eadem lingua utrumque uti, sed sufficit congruenter ad interrogatum respondere: quin etiam duo Græci Latina lingua obligationem contrahere possunt. Sed hæc sollemnia verba olim quidem in usu fuerunt: postea autem Leoniana consitutio lata est, quæ, sollemnitate verborum sublata, sensum et consonantem intellectum

1. Formerly the words used in making this kind of contract were as follows—'*Spondes?* do you engage yourself? *Spondeo*, I do engage myself. *Promittis?* do you promise? *Promitto*, I do promise. *Fidepromittis?* do you promise on your good faith? *Fidepromitto*, I do promise on my good faith. *Fidejubes?* do you make yourself *fidejussor?* *Fidejubeo*, I do make myself *fidejussor*. *Dabis?* will you give? *Dabo*, I will give. *Facies?* will you do? *Faciam*, I will do.' And it is immaterial whether the stipulation is in Latin or in Greek, or in any other language, so that the parties understand it; nor is it necessary that the same language should be used by each person, but it is sufficient if the

ab utraque parte solum desiderat, licet quibuscumque verbis expressus est.

answer agrees with the question. So two Greeks may contract in Latin. Anciently indeed it was necessary to use the formal words just mentioned, but the constitution of the Emperor Leo was afterwards enacted, which, removing formalities of expression, requires only that the parties understand one another and mean the same thing, no matter what words they use.

GAI. iii. 92, 93; D. xlv. 1. 1. 6; C. viii. 37. 10.

Spondes? spondeo was the form exclusively proper when both parties were Roman citizens; *adeo propria civium Romanorum est, ut ne quidem in Græcum sermonem per interpretationem proprie transferri possit, quamvis dicatur a Græca voce figurata esse.* (GAI. iii. 93.)

This constitution of Leo was published A.D. 472. (C. viii. 37. 10.)

2. Omnis stipulatio aut pure aut in diem aut sub condicione fit. Pure veluti 'quinque aureos dare spondes?' Idque confestim peti potest. In diem, cum adjecto die, quo pecunia solvatur, stipulatio fit: veluti 'decem aureos primis kalendis Martiis dare spondes?' Id autem, quod in diem stipulamur, statim quidem debetur, sed peti priusquam dies veniat, non potest: ac ne eo quidem ipso die, in quem stipulatio facta est, peti potest, quia totus ille dies arbitrio solventis tribui debet. Neque enim certum est, eo die, in quem promissum est, datum non esse, priusquam is prætereat.

2. Every stipulation is made simply, or with the introduction of a particular time, or conditionally. Simply, as, 'Do you engage to give five *aurei*?' in this case the money may be instantly demanded. With the introduction of a particular time, as when a day is mentioned on which the money is to be paid, as, 'Do you engage to give me ten *aurei* on the first of the calends of March?' That which we stipulate to give at a particular time becomes immediately due, but cannot be demanded before the day arrives, nor can it even be demanded on that day, for the whole of the day is allowed to the debtor for payment, as it is never certain that the payment has not been made on the day appointed until that day is at an end.

D. xlv. 1. 46. pr.; D. l. 16. 213.

In the technical language of the jurists, *Ubi pure quis stipulatus fuerit, et cessit et venit dies; ubi in diem, cessit dies, sed nondum venit.* (See note on Bk. ii. Tit. 20. 20.) If the stipulation was made *pure*, the interest in the thing stipulated for passed at once to the stipulator (*cessit dies*), and he could at once demand to have it (*venit dies*), giving, of course, sufficient time for the debtor to fulfil his obligation. If the stipulation was made *in diem*, the interest in the thing stipulated for passed at once to the stipulator, but he could not demand it until the *dies* was past.

There is a distinction in the respective effects of a stipulation *in diem* and of a conditional stipulation that deserves notice. When a stipulation was made *in diem*, the promise was binding

at once, and the debt was already due, and therefore if any part of the debt was paid before the day named, it could not be recovered; whereas, when a stipulation was made with a condition, if anything was paid before the condition was accomplished, it could be recovered, because, until the condition was fulfilled, the stipulator had no interest in the thing stipulated for (*nondum cessit dies*). (See paragr. 4.)

3. At si ita stipuleris 'decem aureos annuos, quoad vivam, dare spondes?' et pure facta obligatio intellegitur et perpetuatur, quia ad tempus deberi non potest. Sed heres petendo pacti exceptione submovebitur.

3. But, if you stipulate thus, 'Do you engage to give me ten *aurei* annually, as long as I live? the obligation is understood to be made simply, and is perpetual; for a debt cannot be due for a time only; but the heir, if he demands payment, will be repelled by the *exceptio pacti.*

D. xlv. 1. 56. 4.

Lapse of time was not, in the Roman law, a mode by which a debt could be extinguished. Consequently, if it was owed, it was owed for ever: but this technicality was prevented from working any injustice by the plea referred to in the text, namely that there was an agreement to the contrary, or by that of fraud. *Plane post tempus stipulator vel pacti conventi, vel doli mali exceptione submoveri poterit.* (D. xliv. 7. 44. 1.) If, however, a similar gift had been given as a legacy, the right to receive would be extinguished *ipso jure* by the death of the legatee.

4. Sub condicione stipulatio fit, cum in aliquem casum differtur obligatio, ut, si aliquid factum fuerit aut non fuerit, stipulatio committatur, veluti 'si Titius consul factus fuerit, quinque aureos dare spondes?' Si quis ita stipuletur 'si in Capitolium non ascendero, dare spondes?' perinde erit, ac si stipulatus esset, cum morietur dari sibi. Ex condicionali stipulatione tantum spes est debitum iri, eamque ipsam spem transmittimus, si, priusquam condicio existat, mors nobis contigerit.

4. A stipulation is made conditionally, when the obligation is postponed to the happening of some uncertain event, so that it takes effect if such a thing happens or does not happen, as, for instance, 'Do you engage to give five *aurei* if Titius is made consul?' Such a stipulation as 'Do you engage to give five *aurei* if I do not go up to the Capitol?' is in effect the same as if the stipulation had been, that five *aurei* should be given to the stipulator at the time of his death. From a conditional stipulation there arises only a hope that the thing will become due; and this hope we transmit to our heirs, if we die before the condition is accomplished.

D. xlv. 1. 115. 1; D. l. 16. 54.

The heir or legatee, it may be remembered (see Bk. ii. Tit. 14. 9), who died before the condition was accomplished, did not transmit any interest in the inheritance or legacy to his heirs, whereas the stipulator did, as we learn from the text, transmit to his heirs the hope that the thing stipulated for would be one day due to him (*spes debitum iri*). The reason of this difference is,

that the testamentary dispositions were considered to be made to the heir or legatee personally.

If the promissor attempted to defeat the condition by preventing its being fulfilled, he was treated as if he had promised *pure*, and the thing could be demanded from him at once.

It is here said that a promise to pay, if a person did not do a thing, was a promise to pay when he died. There was, however, this difference: the promissor was certain to die, and therefore the stipulation, with the words *cum moriar*, was really made *in diem*; whereas it was not certain whether the promissor would or would not go up to the Capitol, and, therefore, the stipulation with the words *si in Capitolium non ascendero* was made *sub conditione*.

5. Loca etiam inseri stipulationi solent, veluti 'Carthagine dare spondes?' Quæ stipulatio licet pure fieri videatur, tamen re ipsa habet tempus injectum, quo promissor utatur ad pecuniam Carthagine dandam. Et ideo si quis ita Romæ stipuletur 'Hodie Carthagine dare spondes?' inutilis erit stipulatio, cum impossibilis sit repromissio.

5. It is customary to insert a particular place in a stipulation, as, for instance, 'Do you engage to give me at Carthage?' and this stipulation, although it appears to be made simply, yet necessarily implies a delay sufficient to enable the person who promises to pay the money at Carthage. And therefore, if any one at Rome stipulates thus, 'Do you engage to give to me this day at Carthage?' the stipulation is useless, because the fulfilment of the promise is impossible.

D. xlv. 1. 73. pr.; D. xiii. 4. 2. 6.

6. Condiciones, quæ ad præteritum vel ad præsens tempus referuntur, aut statim infirmant obligationem aut omnino non differunt: veluti 'si Titius consul fuit, vel si Mævius vivit, dare spondes?' Nam si ea ita non sunt, nihil valet stipulatio: sin autem ita se habent, statim valet. Quæ enim per rerum naturam certa sunt, non morantur obligationem, licet apud nos incerta sint.

6. Conditions, which relate to time present or past, either instantly make the obligation void, or do not suspend it in any way; as, for instance, 'If Titius has been consul, or if Mævius is alive, do you engage to give me?' For if the thing mentioned is not really the case, the stipulation is void; if it is the case, the stipulation is immediately valid: since things certain, if regarded in themselves, although uncertain as far as our knowledge is concerned, do not delay the formation of the obligation.

D. xlv. 1. 100; D. xii. 1. 37-39.

7. Non solum res in stipulatum deduci possunt, sed etiam facta: ut si stipulemur fieri aliquid vel non fieri. Et in hujusmodi stipulationibus optimum erit pœnam subjicere, ne quantitas stipulationis in incerto sit ac necesse sit actori probare, quid ejus intersit. Itaque si quis, ut fiat aliquid, stipuletur, ita adjici pœna debet: 'si ita factum non erit, tum pœnæ nomine decem aureos dare spondes?' Sed si quædam fieri, quædam non fieri una eademque conceptione stipuletur, clausula erit hujus-

7. Not only things, but acts, may be the subject of a stipulation: as when we stipulate, that something shall, or shall not, be done. And, in these stipulations, it will be best to subjoin a penalty, lest the amount included in the stipulation should be uncertain, and the plaintiff should therefore be obliged to prove how great his interest is. Therefore, if any one stipulates that something shall be done, a penalty ought to be added as thus: 'If the thing is not done, do you engage to give ten *aurei* by way of penalty?'

modi adjicienda: 'si adversus ea factum erit, sive quid ita factum non erit, tunc pœnæ nomine decem aureos dare spondes?'

But, if by one single question a stipulation is made, that some things shall be done, and that other things shall not be done, there ought to be added some such clause as this: 'If anything is done contrary to what is agreed on, or anything agreed on is not done, then do you engage to give ten *aurei* by way of penalty?'

D. xlv. 1. 137. 7; D. xlvi. 5. 11.

TIT. XVI. DE DUOBUS REIS STIPULANDI ET PROMITTENDI.

Et stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondeat 'spondeo'. Ut puta cum duobus separatim stipulantibus ita promissor respondeat 'utrique vestrum dare spondeo': nam si prius Titio spoponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse. Duo pluresve rei promittendi ita fiunt (veluti si post Titii interrogationem), 'Mævi, quinque aureos dare spondes? Sei, eosdem quinque aureos dare spondes?' respondeat singuli separatim 'spondeo'.

Two or more persons may be parties together in the stipulation or in the promise. In the stipulation, if, after all have asked the question, the promissor answers, '*Spondeo*,' 'I engage'; for instance, when, two stipulators having each separately asked the question, the promissor answers, 'I engage to give to each of you'. For if he first answers Titius, and then, on another person putting the same question, he again answers him, there will be two distinct obligations, and not two co-stipulators. Two or more become co-promissors, thus, as if after Titius has put the question: 'Mævius, do you engage to give five *aurei*?' 'Seius, do you engage to give five *aurei*?' they each separately answer, 'I do engage'.

D. xlv. 2. 4.

The word *reus*, strictly speaking, signifies the person who is liable, or subject, to a demand, but is used more generally to signify a party to an obligation, whether active or passive: so here we have *rei stipulandi*, as well as *rei promittendi*.

It was immaterial whether the interrogation was put and answered in the plural, *spondetis? spondemus;* or in the singular, *spondes? spondeo*. (D. xlv. 2. 4.)

It was not only in contracts made *verbis* that there could be joint creditors and joint debtors. In a *commodatum* or *depositum*, for instance, the parties might agree that several persons should be subject to a common obligation, and each be bound for the whole. (D. xlv. 2. 9.)

1. Ex hujusmodi obligationibus et stipulantibus solidum singulis debetur et promittentes singuli in solidum tenentur. In utraque tamen obligatione una res vertitur: et vel alter debitum accipiendo vel alter

1. By virtue of such obligations, the whole thing stipulated for is due to each stipulator, and from each promissor. But in each obligation, there is only one thing due, and if either of the joint parties receives the thing due,

solvendo omnium perimit obligationem et omnes liberat.

or gives the thing due, the obligation is at end for all, and all are freed from it.

D. xlv. 2. 2, and 3. 1.

If we look to the thing which was the subject of the contract, we may say, however many were the joint parties, there was but one obligation; while if we look to the persons by or to whom the promise was given, there were as many obligations as there were persons making or receiving the promise. If, therefore, the thing was given, that is, payment or performance made, the obligation was at an end, but the obligation binding on any one might be made to cease, as by the *deminutio capitis* of one of the co-promissors, without those binding on the others ceasing also. If, indeed, the aid of the law had been called in to enforce the obligation, the position of the parties was different. If one co-stipulator sued the promissor, all the other parties to the stipulation were thereby prevented from suing him; and if one co-promissor was sued, none of the others could be sued, the *litis contestatio* operating as an extinction of the debt; but under Justinian, when it appeared that there was a deficiency in what had been obtained from the promissor that had been sued, the others might be sued to make up this deficiency. (C. viii. 41. 28.) The co-promissor who had paid all could recover, as a partner, their shares from the others, if there was a partnership between them, and if not, he could recover by paying to the creditor the whole sum, but separating the payment, paying his share absolutely, and paying the rest as the price of having the creditor's actions transferred to him to use against the other co-promissors (*beneficium cedendarum actionum*); and probably, even if he had not actually made this separation, the prætor would allow him to bring an action against the other co-promissors in which he was feigned to have done it. (D. xxvii. 3. 1. 13.)

2. Ex duobus reis promittendi alius pure, alius in diem vel sub condicione obligari potest: nec impedimento erit dies aut condicio, quo minus ab eo, qui pure obligatus est, petatur.

2. Of two co-promissors, one may engage simply, the other with the introduction of a particular time, or conditionally; and neither the time nor the condition will prevent payment being exacted from the one who binds himself simply.

D. xlv. 2. 7

Tit. XVII. DE STIPULATIONE SERVORUM.

Servus ex persona domini jus stipulandi habet. Sed hereditas in plerisque personæ defuncti vicem sustinet: ideoque quod servus hereditarius ante aditam hereditatem stipulatur, adquirit hereditati ac per hoc etiam heredi postea facto adquiritur.

A slave derives from the *persona* of his master the power of making a stipulation. But as the inheritance in most respects represents the *persona* of the deceased, if a stipulation is made by a slave belonging to the inheritance before the inheritance is entered on,

he acquires for the inheritance, and therefore for him who subsequently becomes heir.

D. xli. 1. 34, 61.

A slave had no *persona*, that is, no capacity of acquiring civil or political rights. But his master, who had such a capacity, could make his own *persona* speak and act through the slave, who was thus only a channel by which the wishes of the master were expressed. (See Bk. i. Tit. 3. pr. note.) But although a slave could thus engage others for the benefit of his master, by a stipulation, he could not bind his master, and could not, therefore, be the promissor in a stipulation; hence, the text only speaks of the stipulations, and not of the promises, of slaves.

In plerisque personæ defuncti vicem sustinet; the inheritance represented the person of the deceased in most things, but there were some things which the slave could not acquire for the inheritance, which he could acquire for a living master: a usufruct, for instance, being always attached to a person, could not be stipulated for by a slave before the inheritance was entered on. (D. xli. 1. 61.)

1. Sive autem domino sive sibi sive conservo suo sive impersonaliter servus stipuletur, domino adquirit. Idem juris est et in liberis, qui in potestate patris sunt, ex quibus causis adquirere possunt.

1. Whether a slave stipulates for his master, or for himself, or for his fellow-slave, or without naming any person for whom he stipulates, he always acquires for his master. It is the same with children in the power of their father, in all cases in which they acquire for him.

D. xlv. 3. 15; D. xlv. 1. 45. pr. and 4.

What is said here of the children *in potestate* must be taken with all the limitations made necessary by the power they had to acquire a *peculium* for themselves. (See Bk. ii. Tit. 9.)

2. Sed cum factum in stipulatione continebitur, omnimodo persona stipulantis continetur, veluti si servus stipuletur, ut sibi ire agere liceat: ipse enim tantum prohiberi non debet, non etiam dominus ejus.

2. If it is a licence to do something that is stipulated for, the benefit of the stipulation is personal to the stipulator; for instance, if a slave stipulates that he shall have a right of passage for himself or beasts and vehicles, it is he himself, not his master, who is not to be hindered from passing.

D. xlv. 1. 130.

Even in this case the slave really acquires for the master. It is the master, and not the slave, who could enforce the stipulation by action. Of course this personal licence to cross land is something quite different from a servitude. For a servitude *eundi* or *agendi*, stipulated for by the slave, could only be attached to the *prædium* of the master. (D. xlv. 3. 17.)

3. Servus communis stipulando unicuique dominorum pro portione dominii adquirit, nisi si unius eorum jussu aut nominatim cui eorum stipulatus est: tunc enim soli ei adquiritur. Quod servus communis stipulatur, si alteri ex dominis adquiri non potest, solidum alteri adquiritur, veluti si res, quam dari stipulatus est, unius domini sit.

3. If a slave held in common by several masters stipulates, he acquires a share for each master according to the proportion which each has in him, unless he stipulates at the command or in the name of any one master, for then the thing stipulated for is acquired solely for that master. And whatever a slave held in common stipulates for, is all acquired for one of his masters, if it is not capable of being acquired for the other; as, for instance, if the thing he has stipulated to be given belongs to one of his masters.

GAI. iii. 167; D. xlv. 3. 7. 1.

TIT. XVIII. DE DIVISIONE STIPULATIONUM.

Stipulationum aliæ judiciales sunt, aliæ prætoriæ, aliæ conventionales, aliæ communes tam prætoriæ quam judiciales.

Stipulations are either judicial, or prætorian, or conventional, or common, that is, both prætorian and judicial.

D. xlv. 1. 5. pr.

The division of stipulations here given is based on the difference of the circumstances in which they are entered into. Sometimes they are the result simply of the will of the parties, sometimes of the direction of a person in authority.

1. Judiciales sunt dumtaxat, quæ a mero judicis officio proficiscuntur: veluti de dolo cautio vel de persequendo servo, qui in fuga est, restitüendove pretio.

1. Judicial stipulations are those which proceed exclusively from the office of the judge, such as the giving security against fraud, or the engagement to pursue a fugitive slave, or to pay his price.

D. xlv. 1. 5. pr.; D. xxx. 69. 5.

Before the magistrate the parties were *in jure*, before the *judex* they were *in judicio*. (See Introd. sec. 92.) The *judex* sometimes ordered that the parties before him should enter into stipulations.

Two instances are given here of stipulations directed by the *judex*. The first is the *de dolo cautio*. This was a stipulation directed for the benefit of a plaintiff, that the sentence given in his favour might be executed, without any attempt at fraud (*dolus malus*) on the part of the defendant. For instance, if the defendant was ordered to make over the property in a slave, the *judex* would direct that he should stipulate that he had done nothing to lessen the value of the slave. Otherwise the slave might be made over to the plaintiff, and the plaintiff's claim be thus nominally satisfied, while it might really be evaded by the defendant wilfully doing the slave some material harm. (D. vi. 1. 20 and 45.)

The other instance given is that of the stipulation *de perse-*

quendo servo qui in fuga est, restituendove pretio. A slave must be supposed to be demanded, and to run away before the decision is given. As the defendant, being the actual possessor, could alone reclaim the slave against third parties, the *judex* would compel him to engage by stipulation to follow and reclaim him, or to pay his price. If the slave escaped without any fault whatsoever of the defendant, the judge merely directed that the defendant should engage to give up the slave if he came into his power, and to permit the plaintiff to bring an action in the defendant's name for the recovery of the slave from any one who might detain him. (D. iv. 2. 14. 11.)

2. Prætoriæ, quæ a mero prætoris officio proficiscuntur, veluti damni infecti vel legatorum. Prætorias autem stipulationes sic exaudiri oportet, ut in his contineantur etiam ædiliciæ: nam et hæ ab jurisdictione veniunt.

2. Prætorian stipulations are those which proceed exclusively from the office of the prætor; as the giving security against *damnum infectum*, or for the payment of legacies. Under prætorian stipulations must be comprehended ædilitian, for these, too, proceed from a magistrate pronouncing the law.

D. xlv. 1. 5. pr.

Damnum infectum est damnum nondum factum quod futurum veremur. (D. xxxix. 2. 2.) Supposing the *damnum futurum* which a man apprehended were an injury to his premises from the fall of the ill-repaired house of his neighbour, by the strict civil law, if he was to wait till the mischief was done, his neighbour might abandon his property in the fallen house, and the injured man could then obtain no reparation from him. To remedy this, the prætor would, if he saw fit, order the neighbour to give security (*cautio damni infecti*) to indemnify the person applying, his heirs and successors in title, against any damage that might be done. If this order was not obeyed, the prætor authorised the complainant to enter upon and occupy the premises (*in possessionem mittebat*); and, finally, if security was still refused, the prætor gave the complainant full possession of the premises, but he was liable to be dispossessed, if within a certain time the original proprietor made compensation and complied with everything enjoined him. (See D. xxxix. 2. 4. 1.)

Legatorum: this was a stipulation binding the heir to pay legacies, when due, which were not yet payable; otherwise the heir might previously have spent and consumed all the inheritance. As in the previous case, the legatee received possession, if sureties were not given. (D. xxxvi. 3. 1. 2.)

A jurisdictione veniunt, that is, come from a magistrate *qui jus dicit. Jurisdictio,* in its general sense, includes the whole *officium* of the *jus dicens*, which is said to be *latissimum*, for *bonorum possessionem dare potest, et in possessionem mittere, pupillis non habentibus tutores constituere, judices litigantibus dare.* (D. ii. 1. 1.)

3. Conventionales sunt, quæ ex conventione utriusque partis concipiuntur, hoc est neque jussu judicis neque jussu prætoris, sed ex conventione contrahentium. Quarum totidem genera sunt, quot (pæne dixerim) rerum contrahendarum.

3. Conventional stipulations are those which are made by the agreement of parties; that is, neither by the order of a judge nor by that of the prætor, but by the consent of the persons contracting. And of these stipulations there are as many kinds, so to speak, as there are of things to be contracted for.

D. xlv. 1. 5. pr.

4. Communes sunt stipulationes veluti rem salvam fore pupilli: nam et prætor jubet, rem salvam fore pupillo caveri et interdum judex, si aliter expediri hæc res non potest: vel de rato stipulatio.

4. Common stipulations are those, for example, providing for the security of the property of a pupil, for sometimes the prætor, and sometimes, too, when the matter cannot be managed in any other way, the judge, orders security to be given to the pupil for the safeguard of his property, or, again, the stipulation that a thing shall be ratified.

D. xlv. 1. 5. pr.

Communes stipulationes were those sometimes directed by the prætor, sometimes by the *judex*. They ought properly to have preceded the *conventionales*.

Mention has already been made of the security a tutor or curator was obliged to give. (Bk. i. Tit. 24. pr.) It was properly given before the tutor entered on his office, and it belonged to the prætor to see that it was given. But if, before it was given, the tutor sued a debtor of the pupil, and the debtor objected that security had not been given, the judge, in order that the proceedings might not be put an end to, would direct security to be then given before him.

The stipulation *de rato*, or *rem ratam haberi*, was one entered into by a procurator bringing an action in the name of his principal that what he did would be ratified by his principal. It properly belonged to the prætor to direct that this stipulation should be entered into before the *litis contestatio* (see Introd. sec. 105); but if he omitted to direct this, and there was ground for distrusting the authority of the procurator, the judge would direct that the procurator should bind himself by this stipulation. (See Bk. iv. Tit. 11. 1.)

TIT. XIX. DE INUTILIBUS STIPULATIONIBUS.

Omnis res, quæ dominio nostro subjicitur, in stipulationem deduci potest, sive illa mobilis sive soli sit.

Everything, of which we have the property, whether it be moveable or immoveable, may be the subject of a stipulation.

A stipulation is *inutilis*, i.e. invalid, when it produces no tie binding on the parties to it. It would seem to have been proper

to have examined here the causes which make contracts of any kind invalid, and not to limit the inquiry to stipulations. But the stipulation was so much the most important kind of contract that it is taken to represent all other kinds. Some few of the causes of invalidity noticed in this Title are peculiar to stipulations, but most are common to all contracts.

Lagrange thus classifies the reasons given in this Title for the invalidity of stipulations: they might be invalid (1) on account of their object (pr., paragr. 1, 2, 22, 24); (2) on account of the persons by whom (paragr. 7, 8, 9, 10, 12), for whom (paragr. 3, 4, 19, 20, 21), or between whom (paragr. 6) they were made; (3) on account of the manner in which they were made (paragr. 5, 17, 18, 23); (4) on account of the time (paragr. 13, 14, 15, 16, 26), or the condition (paragr. 11, 25) subject to which they were made.

1. At si quis rem, quæ in rerum natura non est aut esse non potest, dari stipulatus fuerit, veluti Stichum, qui mortuus sit, quem vivere credebat, aut hippocentaurum, qui esse non possit, inutilis erit stipulatio.

1. But, if any one stipulates for a thing which does not or cannot exist, as for Stichus, who is dead, but whom he thought to be living, or for a hippocentaur, which cannot exist, the stipulation is void.

Gai. iii. 97.

In such a case no claim could be made for the supposed value of the thing, nor even for a sum promised under a penal clause in case of non-performance. (D. xlv. 1. 69 and 103.)

2. Idem juris est, si rem sacram aut religiosam, quam humani juris esse credebat, vel publicam, quæ usibus populi perpetuo exposita sit, ut forum vel theatrum, vel liberum hominem, quem servum esse credebat, vel rem, cujus commercium non habuit, vel rem suam dari quis stipuletur. Nec in pendenti erit stipulatio ob id, quod publica res in privatum deduci et ex libero servus fieri potest et commercium adipisci stipulator potest et res stipulatoris esse desinere potest: sed protinus inutilis est. Item contra, licet initio utiliter res in stipulatum deducta sit, si postea in earum qua causa, de quibus supra dictum est, sine facto promissoris devenerit, extinguitur stipulatio. Ac ne statim ab initio talis stipulatio valebit 'Lucium Titium, cum servus erit, dare spondes?' et similia, quia natura sui dominio nostro exempta in obligationem deduci nullo modo possunt.

2. It is the same if any one stipulates for a thing sacred or religious, which he thought to be subject to human law, or for a public thing appropriated to the perpetual use of the people, as a forum or theatre, or for a free man whom he thought to be a slave, or for a thing of which he has not the *commercium*, or for a thing belonging to himself. Nor will the stipulation remain in suspense, because the public thing may become private, the freeman may become a slave, the stipulator may acquire the *commercium* of the thing, or the thing which now belongs to him may cease to be his; but the stipulation is at once void. So, conversely, although a thing may have been validly stipulated for originally, yet, if it afterwards falls under the class of any of the things before mentioned, without the promissor having caused the change, the stipulation is extinguished. Such a stipulation, too, as the following, is void *ab initio*, 'Do you promise to give me Lucius Titius, when he shall become a slave?' for that which by its

nature is not susceptible of ownership cannot in any way be made the subject of an obligation.

GAI. iii. 97; D. xlv. 1. 82. 83. 5.

Cujus commercium non habuit. For instance, if, in the days of Gaius, a *peregrinus* had stipulated for a *fundus Italicus*, or if, in the times of the Lower Empire, a heathen had stipulated for a Christian slave. (C. i. 10.) Of course, if the promissor had not the *commercium* of the particular thing, while the stipulator had it, the promissor was answerable to the stipulator for a breach of contract if he did not fulfil his promise. (D. xlv. 1. 34.)

Vel rem suam. It cannot belong to him more than it does; but he might stipulate for its value, or conditionally for the thing itself if it ceased to belong to him. (D. xlv. 1. 31.)

Extinguitur stipulatio. And if it was once extinguished, no alteration of circumstances would renew it. *In perpetuum sublata obligatio restitui non potest.* (D. xlvi. 3. 98. 8.)

Quam humani juris esse credebat. In a stipulation it made no difference that the stipulator was really ignorant that there was some character attaching to the object of the stipulation which made the stipulation invalid, as that it was sacred or public. The fact that it was sacred or public invalidated the stipulation, and the stipulator had no further remedy against the promissor. We shall find (Tit. 23. 5) that if a person purchased in ignorance a thing of this nature, he would have a remedy against the seller to indemnify him for the loss he sustained by the purchase.

3. Si quis alium daturum facturumve quid spoponderit, non obligabitur, veluti si spondeat, Titium quinque aureos daturum. Quodsi effecturum se, ut Titius daret, spoponderit, obligatur.

3. If a man engages that another shall give or do something, he is not bound, as if he engages that Titius shall give five *aurei*. But if he engages that he will manage that Titius shall give five *aurei*, he is bound.

D. xlv. 1. 83. pr.

4. Si quis alii, quam cujus juri subjectus sit, stipuletur, nihil agit. Plane solutio etiam in extranei personam conferri potest (veluti si quis ita stipuletur 'mihi aut Seio dare spondes?'), ut obligatio quidem stipulatori adquiratur, solvi tamen Seio etiam invito eo recte possit, ut liberatio ipso jure contingat, sed ille adversus Seium habeat mandati actionem. Quodsi quis sibi et alii, cujus juri subjectus non sit, decem dari aureos stipulatus est, valebit quidem stipulatio: sed utrum totum debetur, quod in stipulationem deductum est, an vero pars dimidia, dubitatum est: sed placet, non plus quam partem dimidiam ei adquiri. Ei, qui tuo juri subjectus est, si sti-

4. If any one stipulates for the benefit of a third person, other than a person in whose power he is, the stipulation is void. But it may be arranged that payment shall be made to a third person, as if a person stipulates thus, 'Do you engage to pay to me or to Seius?' The stipulator alone, in this case, acquires the obligation; but payment may be lawfully made to Seius even against his will; the payer will then by mere force of law be freed from his obligation, while the stipulator will have against Seius an *actio mandati*. If any one stipulates that ten *aurei* shall be paid to him and to a third person, other than a person in whose power he is, the stipulation is valid; but it has been doubted whether,

pulatus sis, tibi adquiris, quia vox tua tamquam filii sit, sicuti filii vox tamquam tua intellegitur in his rebus, quæ tibi adquiri possunt.

in this case, the whole sum is due to the stipulator, or only half; and it has been decided that only half is due. But, if you stipulate for another, who is in your power, you acquire for yourself; for your words are as the words of your son, and your son's words are as yours, with respect to all things which can be acquired for you.

GAI. iii. 103; D. xlv. 1. 141. 3; D. xlv. 1. 39, 130; D. xxxix. 2. 42.

No one who was not a party to a contract could gain or lose by it. *Res inter alios acta aliis neque nocere neque prodesse potest* (a maxim not to be found exactly in its present shape, but based on C. vii. 60. 1). And as this was true of all kinds of contracts, so was it specially of stipulations, in which a particular formula had to be spoken, and which could not properly be entered into by any one that was absent. The third person, not being a party to the contract, could have no action to enforce it, and the stipulator could not enforce it because he had no interest in it. If, indeed, he had any interest in it, that is, any legal interest, which of course might happen, a stipulation for another was binding. *Si stipuler alii, cum mea interesset, ait Marcellus stipulationem valere*. (D. xlv. 1. 38. 20, and see paragr. 20 of this Title.) And when one person wished to stipulate for another, the object might generally be effected by adding a penalty for the non-performance of the promise. A stipulation binding the promissor to give something to Titius, or, if it were not given, to pay a penalty to the stipulator, was binding. It was, indeed, nothing but a conditional contract. In the event of something not happening, which might have happened, a certain benefit was to accrue to the stipulator. (D. xlv. 1. 38. 17.) It is because the thing might have happened that such a penal clause differs in its effects from one made to enforce the performance of a thing physically impossible. (See note on paragr 1.)

Mihi aut Seio. The third person to whom payment might be thus made at the option of the payee, was said to be *solutionis gratia adjectus*. (D. xlvi. 3. 95. 5.)

Sibi et alii. We learn from Gaius, that the Sabinians were of opinion that the whole sum specified was in this case due to the stipulator. Justinian adopts the contrary opinion. (GAI. iii. 103.)

Every one could stipulate and promise for his heir. Every *paterfamilias* could stipulate for those under his power and his slaves; every person under power and every slave could stipulate for the *paterfamilias* or master, and could promise so as to bind the *paterfamilias* or master, if authorised, directly or indirectly, to do so. (See Bk. iv. Tit. 7.)

In the later law many kinds of stipulations could be made through another person, though this was contrary to the primary notion of a stipulation. For instance, the stipulation '*rem pupilli salvam fore*' (see Tit. 18. 4) could be made, for a pupil who

was *infans*, or absent, by a public slave, by a person appointed by the prætor, or by a magistrate if the parties came before him. (D. xxvii. 8. 1. 15.)

5. Præterea inutilis est stipulatio, si quis ad ea, quæ interrogatus erit, non respondeat, veluti si decem aureos a te dari stipuletur, tu quinque promittas, vel contra: aut si ille pure stipuletur, tu sub condicione promittas, vel contra, si modo scilicet id exprimas, id est si cui sub condicione vel in diem stipulanti tu respondeas: 'Præsenti die spondeo'. Nam si hoc solum respondeas 'Promitto,' breviter videris in eandem diem aut condicionem spopondisse: nec enim necesse est in respondendo eadem omnia repeti, quæ stipulator expresserit.

5. A stipulation, again, is void, if the answer does not agree with the demand; as when a person stipulates that ten *aurei* shall be given him, and you answer five, or conversely. A stipulation is also void, if a person stipulates simply, and you promise conditionally, or conversely; provided only that the disagreement is expressly stated, as if, when a man stipulates conditionally, or for a particular time, you answer, 'I promise for to-day'. But, if you answer only, 'I promise,' you seem in a brief way to agree to the time or condition he proposes. For it is not necessary, that in the answer every word should be repeated which the stipulator expressed.

D. xlv. 1. 1. 3, 4; D. xlv. 1. 134. 1.

Si decem aureos. Ulpian, in the Digest, decides the question the other way. (D. xlv. 1. 1. 4.)

6. Item inutilis est stipulatio, si ab eo stipuleris, qui juri tuo subjectus est, vel si is a te stipuletur. Sed servus quidem non solum domino suo obligari non potest, sed ne alii quidem ulli: filii vero familias aliis obligari possunt.

6. A stipulation is also void if made with one who is in your power, or if such a person stipulates with you. A slave is incapable not only of entering into an obligation with his master, but of binding himself to any other person. But a *filiusfamilias* can be bound to others by an obligation.

GAI. iii. 104; D. xliv. 7. 14.

The slave could not contract civilly with his master; but the later law recognised that there might be a *naturalis obligatio* created between them, so that if a master owed anything to a slave in the accounts kept between them, and paid it to the slave after he had been manumitted, the master could not recover it, as he was paying what, by a natural obligation, he was bound to pay. (D. xii. 6. 64.)

The *filiusfamilias* could bind himself civilly. *Filiusfamilias ex omnibus causis tanquam paterfamilias obligatur.* (D. xliv. 7. 39.) He could be sued and his person taken in execution, and his *peculia* could be made available for his creditors; and Justinian permitted him to make a *cessio bonorum.* (C. vi. 61. 8.) To protect *filiifamiliarum*, the *senatusconsultum Macedonianum* was passed, by which money lent to *filiifamiliarum* could not be recovered from them. (See. Bk. iv. Tit. 7. 7.)

7. Mutum neque stipulari neque promittere posse, palam est. Quod et in surdo receptum est: quia et is,

7. It is evident that a dumb man can neither stipulate nor promise. And this is considered to apply alsc

qui stipulatur, verba promittentis et is, qui promittit, verba stipulantis audire debet. Unde apparet, non de eo nos loqui, qui tardius exaudit, sed de eo, qui omnino non exaudit.

to deaf persons, for he who stipulates ought to hear the words of the promissor, and he who promises, the words of the stipulator. Hence it is clear that we are not speaking of a person who hears with difficulty, but of one who cannot hear at all.

GAI. iii. 105; D. xliv. 7. 1. 15.

8. Furiosus nullum negotium gerere potest, quia non intellegit, quid agit.

8. A madman can go through no legal act, because he does not understand what he is doing.

GAI. iii. 106; D. xliv. 7. 1. 12.

During lucid intervals a madman could make valid stipulations or promises, as he could make a will. (Bk. ii. Tit. 12. 1.)

9. Pupillus omne negotium recte gerit: ut tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur tutor, veluti si ipse obligetur: nam alium sibi obligare etiam sine tutoris auctoritate potest.

9. A pupil may go through any legal act, provided that the tutor takes a part in the proceeding in cases where his authorisation is necessary, as, for instance, when the pupil binds himself; for a pupil can bind others to him without the authorisation of his tutor.

GAI. ii. 107.

10. Sed quod diximus de pupillis, utique de his verum est, qui jam aliquem intellectum habent; nam infans et qui infantiæ proximus est, non multum a furioso distant, quia hujus ætatis pupilli nullum intellectum habent: sed in proximis infantiæ propter utilitatem eorum benignior juris interpretatio facta est, ut idem juris habeant, quod pubertati proximi. Sed qui in parentis potestate est impubes, nec auctore quidem patre obligatur.

10. This must be understood only of pupils who already have some understanding; for an infant, or one still near to infancy, differs but little from a madman, because pupils of such an age have no understanding at all. But, in order to consult their interest, the law has been construed more favourably to those who are near to infancy, and they are allowed the same rights as those near the age of puberty. But a son in the power of his father, and under the age of puberty, cannot bind himself even if his father authorises him.

GAI. iii. 109; D. xlv. 1. 141. 2.

An infant was properly one *qui fari non potest*, a child not yet old enough to speak with understanding of what he said, i.e. who was below the age of seven years. When a child could talk, and began to have some degree of understanding, he was termed *infanti proximus*. Theophilus, in his paraphrase of this paragraph, says, *proximus infanti qualis fuerit qui septimum aut octavum annum agit*. He could now pronounce, and in some measure understand, the words of a stipulation, and the law permitted him to do so with the sanction of his tutor in certain cases, such as the acquisition of an inheritance, where his personal intervention was necessary. But the law did not allow him to stipulate

except when the stipulation was clearly for his benefit. (Bk. i. Tit. 21; D. xxix. 2. 9.)

Just as the child who was older than an infant was said to be *infantiæ proximus*, so one a little younger than a *pubes* was said to be *pubertati proximus*. The original notion seems to have been that the child *infantiæ proximus* could not do things which the *pubertati proximus* could do. There was a clear difference between a child between seven and eight and a child between thirteen and fourteen. But the capacity existing in the intervening years would vary with the individual. Gradually the law recognised more and more the acts of the child over seven years, as this was considered, as the text says, the *benignior interpretatio*, the more favourable interpretation to the child, as removing doubts as to his competence, and avoiding the necessity of having recourse to a slave to stipulate for the child. (D. xlvi. 6. 6.) But, with regard to delicts, the *benignior interpretatio* would be to mark the distinction between different ages of children above seven; and so we are told (Bk. iv. Tit. 1. 18) that the *impubes* is only bound *ex furto* in case *proximus pubertati sit et ob id intellegat se delinquere*.

The *paterfamilias* could not, like a tutor, supply his authority to make up what was deficient in the capacity of the *impubes*. The concluding words of this paragraph are taken from Gaius, who makes his statement more complete by adding *pubes vero qui in potestate est, proinde ac si paterfamilias obligari solet*. (D. xlv. 1. 141. 2.)

11. Si impossibilis condicio obligationibus adjiciatur, nihil valet stipulatio. Impossibilis autem condicio habetur, cui natura impedimento est, quo minus existat, veluti si quis ita dixerit: 'si digito cælum attigero, dare spondes?' At si ita stipuletur, 'si digito cælum non attigero, dare spondes?' pure facta obligatio intellegitur ideoque statim petere potest.

11. If an impossible condition is added to an obligation, the stipulation is void. A condition is considered impossible of which nature forbids the accomplishment; as, if a person says, 'Do you promise if I touch the sky with my finger?' But if a stipulation is made thus, 'Do you promise if I do not touch the sky with my finger?' the obligation is considered as unconditional, and so performance may be instantly demanded.

Gai. iii. 98; D. xlv. 1. 7.

An impossible condition in a testamentary gift was treated as if it had never been inserted. In a stipulation or any other contract it made the contract void, a difference due to the favour with which testamentary gifts were regarded. (See Bk. ii. Tit. 14. 10.)

In the stipulation, 'If I do not touch the sky,' &c., there is really no condition; there is nothing left undecided in the mind of the speaker or hearer.

12. Item verborum obligatio inter absentes concepta inutilis est. Sed cum hoc materiam litium conten-

12. A verbal obligation, made between absent persons, is also void. But as this doctrine afforded matter of

tiosis hominibus præstabat, forte post tempus tales allegationes opponentibus et non præsentes esse vel se vel adversarios suos contendentibus: ideo nostra constitutio propter celeritatem dirimendarum litium introducta est, quam ad Cæsarienses advocatos scripsimus, per quam disposuimus, tales scripturas, quæ præsto esse partes indicant, omnimodo esse credendas, nisi ipse, qui talibus utitur improbis allegationibus, manifestissimis probationibus vel per scripturam vel per testes idoneos approbaverit, in ipso toto die, quo conficiebatur instrumentum, sese vel adversarium suum in aliis locis esse.

strife to contentious men, who alleged, after some time had elapsed, that either they or their adversaries were not present, we issued a constitution, addressed to the advocates of Cæsarea, in order to provide for the speedy determination of such suits. By this we have enacted, that written acts which declare that the contracting parties were present, shall be considered as indisputable evidence of the fact, unless the party who has recourse to such shameless allegations makes it evident, by the most manifest proofs, either by writing or by credible witnesses, that either he or his adversary was in some other place during the whole day in which the instrument was made.

GAI. iii. 138; C. viii. 38. 14.

No writing was necessary to make a verbal contract valid; but one was generally drawn up as a record of the transactions, and called *instrumentum* or *cautio*, as being a security for the stipulator. An example of a contract reduced to writing is given in D. xlv. 1. 126. 2.

13. Post mortem suam dari sibi nemo stipulari poterat, non magis quam post ejus mortem, a quo stipulabatur. Ac ne is, qui in alicujus potestate est, post mortem ejus stipulari poterat, quia patris vel domini voce loqui videtur. Sed et si quis ita stipuletur, 'pridie quam moriar,' vel 'pridie quam morieris dari?' inutilis erat stipulatio. Sed cum, ut jam dictum est, ex consensu contrahentium stipulationes valent, placuit nobis etiam in hunc juris articulum necessariam inducere emendationem, ut, sive post mortem sive pridie quam morietur stipulator sive promissor, stipulatio concepta est, valeat stipulatio.

13. A man could not formerly stipulate that a thing should be given him after his own death, any more than after the death of the promissor. Neither could any person in the power of another stipulate that anything should be given him after the death of the person in whose power he was, because it was his father or master who appeared to be speaking in him. And if any one stipulated thus, 'Do you promise to give the day before I die,' or 'the day before you die?' the stipulation was invalid. But since all stipulations, as we have already said, derive their force from the consent of the contracting parties, we have thought it proper to introduce a necessary alteration in this respect, so that now, whether it is stipulated that a thing shall be given after, or immediately before, the death either of the stipulator or the promissor, the stipulation is good.

GAI. iii. 100; C. viii. 38. 11; C. iv. 11.

A stipulation '*pridie quam moriar*' was held to be invalid, because the date when the thing promised became due could not be fixed until the death happened, and then the action would only be acquired for or against the heirs, exactly as in the case of a stipulation '*dabis post mortem*' (GAI. iii. 100); and a stipulation in favour of the heirs only would be one in which the stipulator

had no interest (note to paragr. 4). Gaius says, *inelegans esse visum est ex heredis persona incipere obligationem ;* it was out of the due order of things that a man should enter into an obligation on which no action could be brought until after his death. Justinian does away with all these subtleties.

14. Item si quis ita stipulatus erat: 'si navis ex Asia venerit, hodie dare spondes?' inutilis erat stipulatio, quia præpostere concepta est. Sed cum Leo inclytæ recordationis in dotibus eandem stipulationem, quæ præpostera nuncupatur, non esse rejiciendam existimavit, nobis placuit, et huic perfectum robur accommodare, ut non solum in dotibus, sed etiam in omnibus valeat hujusmodi conceptio stipulationis.

14. Also, if any one stipulated thus, 'If a certain ship arrives hereafter from Asia, do you engage to give to-day?' the stipulation would be void, as being preposterous. But, since the Emperor Leo, of glorious memory, decided that such a stipulation, which is termed *præpostera*, ought not to be rejected with respect to marriage-portions, we have thought it right to give it complete validity, so that now every stipulation made in this way is valid, not only with respect to marriage-portions, but whatever may be its object.

C. vi. 23. 25.

Such a stipulation was said to be *præpostere concepta* (i.e. the things which should come *post* are placed *præ*), because the payment is to be made at once, and thus is placed before (*præ*) instead of after (*post*) the fulfilment of the condition. Under Justinian's enactment the contract was binding at once, but payment could not be enforced until the condition was fulfilled. (C. vi. 23. 25.)

15. Ita autem concepta stipulatio, veluti si Titius dicat 'cum moriar, dare spondes,' vel 'cum morieris?' et apud veteres utilis erat et nunc valet.

15. A stipulation made thus, as if, for instance, Titius says, 'Do you promise to give when I die,' or 'when you die?' was considered valid by the ancients, and is so now.

D. xlv. 1. 45. 3.

The stipulation was said to be valid because the thing was to be given '*non post mortem, sed ultimo vitæ tempore*'. (GAI. ii. 232.) The moment when the performance of the engagement became due was fixed before the time when the rights of the heir were distinct from those of the deceased. A distinction was drawn between such a stipulation and one *dari pridie quam moriar* (par. 13), but, as we have seen in the case of legacies, it rested on no sound reason. (Bk. ii. Tit. 20. 35.)

16. Item post mortem alterius recte stipulamur.

16. We may also validly stipulate that a thing shall be given after the death of a third person.

D. xlv. 1. 45. 1.

The death of a third person was an uncertain term, which might be as legitimately affixed to a stipulation as any other uncertain time. The reason which prevented the stipulation *post mortem meam* or *tuam* did not apply.

17. Si scriptum fuerit in instrumento, promisisse aliquem, perinde habetur, atque si interrogatione præcedente responsum sit.

17. If it is written in an instrument that a person has promised, the promise is considered to have been given in answer to a precedent interrogation.

See PAUL. *Sent.* v. 7. 2. Ulpian says (D. ii. 14. 7. 12), that if, at the end of the instrument of an agreement, the words usually added were found, viz. *rogavit Titius, spopondit Mævius*, the agreement was taken to be a stipulation unless it was expressly shown that it was in reality only a *pactum*.

18. Quotiens plures res una stipulatione comprehenduntur, si quidem promissor simpliciter respondeat 'dare spondeo,' propter omnes tenetur: si vero unam ex his vel quasdam daturum se spoponderit, obligatio in his, pro quibus spoponderit, contrahitur. Ex pluribus enim stipulationibus una vel quædam videntur esse perfectæ: singulas enim res stipulari et ad singulas respondere debemus.

18. When many things are comprehended in one stipulation, a man binds himself to all, if he answers simply 'I promise to give'. But, if he promises to give one or some of the things stipulated for, he is bound only with respect to the things comprised in his answer. For, of the different stipulations contained in the question, only some are considered to have been answered, as for each object a question and an answer are required.

D. xlv. 1. 83. 4; D. xlv. 1. 1. 5.

This should be compared with the cases decided in paragr. 5.

19. Alteri stipulari, ut supra dictum est, nemo potest: inventæ sunt enim hujusmodi obligationes ad hoc, ut unusquisque sibi adquirat, quod sua interest; ceterum si alii detur, nihil interest stipulatoris. Plane si quis velit hoc facere, pœnam stipulari conveniet, ut, nisi ita factum sit, ut comprehensum esset, committatur pœnæ stipulatio etiam ei, cujus nihil interest: pœnam enim cum stipulatur quis, non illud inspicitur, quid intersit ejus, sed quæ sit quantitas sita in condicione stipulationis. Ergo si quis stipuletur Titio dari, nihil agit; sed si addiderit pœnam 'nisi dederis, tot aureos dare spondes?' tunc committitur stipulatio.

19. No one, as we have already said, can stipulate for another, for this kind of obligations has been invented, that every person may acquire what it is for his own advantage to acquire; but if a thing is given to another it is no concern of the stipulator. But if any one wishes to stipulate for another, he should stipulate for a penalty payable to him, so that if the promissor does not perform his promise, the stipulation for the penalty may be valid even for a person who had no interest in the performance of the promise; for when a penalty is stipulated for, it is not the interest of the stipulator that is regarded, but the amount fixed in the condition of the stipulation. If, therefore, any one stipulates that a certain thing shall be given to Titius, this is void; but if he adds a penalty, 'Do you promise to give me so many *aurei* if you do not give the thing to Titius?' this stipulation binds the promissor.

D. xlv. 1. 38. 17.

20. Sed si quis stipuletur alii cum ejus interesset, placuit stipulationem valere. Nam si is, qui pupilli tutelam administrare cœperat, cessit administratione contutori

20. But, if any one stipulates for another, having himself an interest in the performance of the promise, the stipulation has been decided to be valid. Thus if he who has begun to

suo et stipulatus est, rem pupilli salvam fore, quoniam interest stipulatoris fieri, quod stipulatus est, cum obligatus futurus esset pupillo, si male res gesserit, tenet obligatio. Ergo et si quis procuratori suo dari stipulatus sit, stipulatio vires habebit. Et si creditori suo, quod sua interest, ne forte vel pœna committatur vel prædia distrahantur, quæ pignori data erant, valet stipulatio.

act as tutor afterwards gives up the administration to his co-tutor, and stipulates for the security of the estate of his pupil, since it is for the interest of the stipulator that the promise should be performed, as he is answerable to the pupil for maladministration, the obligation is binding. So if a person stipulates that a thing shall be given to his procurator, the stipulation is effectual. So, too, is a stipulation that a thing shall be given to a creditor of the stipulator, the stipulator having an interest in the performance of the promise; as, for instance, that he may avoid becoming liable to a penal clause, or that his immoveables, given in pledge, should not be sold.

D. xlv. 1. 38. 20. 23.

See note on paragr. 4. The tutor was liable for all his co-tutor did. (See Bk. i. Tit. 24. 1.)

21. Versa vice qui alium facturum promisit, videtur in ea esse causa, ut non teneatur, nisi pœnam ipse promiserit.

21. Conversely, he who undertakes for the performance of another, is not bound unless he promises under a penalty.

D. xlv. 1. 38. 2.

The law on this point is more accurately stated in paragr. 3.

22. Item nemo rem suam futuram in eum casum, quo sua fit, utiliter stipulatur.

22. No man can validly stipulate that a thing which may hereafter belong to him shall be given him when it becomes his.

D. xlv. 1. 87.

When the time was come, the stipulation would have nothing on which to take effect.

23. Si de alia re stipulator senserit, de alia promissor, perinde nulla contrahitur obligatio, ac si ad interrogatum responsum non esset, veluti si hominem Stichum a te stipulatus quis fuerit, tu de Pamphilio senseris, quem Stichum vocari credideris.

23. If the stipulator intends one thing, and a promissor another, an obligation is no more contracted than if no answer had been made to the interrogation; for instance, if any one has stipulated that you should give Stichus, and you understood him to refer to Pamphilus, thinking that Pamphilus was called Stichus.

D. xlv. 1. 137. 1.

Stipulatio ex utriusque consensu valet. (D. xlv. 1. 83. 1.) And if the seeming consent implied in pronouncing the words of the stipulation was vitiated by a mistake under which one party spoke of one thing and the other of another, the stipulation was void; but if the mistake was only with reference to something in, or relating to, the thing they were speaking of, i.e. if they were

really speaking of the same thing, but one party was under some misapprehension respecting it, the stipulation was valid. So it was valid if fraud or violence had been used to procure it; but though in such cases it was valid, the rights it gave were worthless under the jurisdiction of the prætor, who always allowed *exceptiones doli metus*, &c., by which the action brought on the stipulation was repelled.

24. Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.

24. A promise founded on a base consideration, as if a man engages to commit homicide or sacrilege, is not binding.

D. xlv. 1. 26, 27.

A thing was said to be *promissum ex turpi causa*, when it was promised, being itself illegal or immoral, or was the reward, or depended on the happening, of anything illegal or immoral.

25. Cum quis sub aliqua condicione fuerit stipulatus, licet ante condicionem decesserit, postea existente condicione, heres ejus agere potest. Idem est et a promissoris parte.

25. If a stipulation is conditional, although the stipulator dies before the accomplishment of the condition, yet if, afterwards, the condition is accomplished, his heir can demand the execution of the promise; and so, too, the heir of the promissor may be sued.

D. xlv. 1. 57.

26. Qui hoc anno aut hoc mense dari stipulatus sit, nisi omnibus partibus præteritis anni vel mensis non recte petet.

26. A person who stipulates that a thing shall be given to him in such a year or month, cannot legally demand the thing promised until the whole year or month has elapsed.

D. xlv. 1. 42.

27. Si fundum dari stipuleris vel hominem, non poteris continuo agere, nisi tantum spatii præterierit, quo traditio fieri possit.

27. If you stipulate for a piece of ground or a slave, you cannot instantly demand the thing, but must wait until enough time has passed for delivery to have been made.

D. xlv. 1. 73. pr.

Tit. XX. DE FIDEJUSSORIBUS.

Pro eo, qui promittit, solent alii obligari, qui fidejussores appellantur, quos homines accipere solent, dum curant, ut diligentius sibi cautum sit.

It is customary that other persons, termed *fidejussores*, should bind themselves for the promissor, creditors generally requiring that they should do so in order that the security may be greater.

Gai. iii. 115, 117.

We have already noticed in Title 16 the cases of persons who joined in making the same stipulation or who joined in making the same promise. We now come to the cases of persons who come in as accessories to the creditor or debtor. Many of the rules of

law applying to the *correi stipulandi* or *promittendi* applied to these accessories; thus if payment was made to the accessory of the creditor, the debtor was free as against the creditor; and if the principal debtor or any of his accessories was sued, no further action could, until Justinian permitted it, be brought by the creditor against those who were not sued, the *litis contestatio* operating as an extinction of the debt.

Besides the principal parties to a stipulation, the stipulator and the promissor, there might be accessory parties, called respectively *adstipulatores* and *adpromissores*. The *adstipulator* either received the same promise as his principal did, and could, therefore, have the same actions, and equally receive or exact payment; or he only stipulated for a part of that for which the principal stipulated, and then his rights were co-extensive with the amount of his own stipulation. (GAI. iii. 113.) In the early law, the chief use of an *adstipulator* was, probably, to supply the place of a procurator at a time when the law refused to allow stipulations to be made by procuration. A might make a stipulation, and know that at the time when payment would be due he would be abroad. He, therefore, joined B in the stipulation, who could receive payment or bring an action in his place, and would be bound by an *actio mandati* to pay over to A whatever he had received.

Before the time of Justinian no one could stipulate validly for a thing after his own death (see Tit. 19. 13); and, therefore, those who wished to make such a stipulation joined an *adstipulator* with them, and this *adstipulator* could bring an action, or receive payment, after the death of the stipulator. As, in the days of Gaius, all contracts could be made by procuration, it appears from his account of the *adstipulator*, which is the only one we have, that the only use of the *adstipulator* was to make this stipulation *post mortem suam* valid. (GAI. iii. 117.)

The *adstipulator* could not transmit his right of action even to his heirs. His rights were purely personal, because he was selected by the stipulator, to whom he stood in the relation of a mandatary, from motives of personal confidence. (GAI. iii. 114.)

The *adpromissores* were accessory to the promise, in order to give the stipulator greater security. They were guarantees for the fulfilment of the promise (GAI. iii. 116), and these guarantees were termed *sponsors* when Roman citizens, as they pledged themselves by the word *spondeo*, a word which citizens alone could utter, and *fidepromissores* when *peregrini* (GAI. iii. 120), because, in binding themselves, they used the expression *fide mea promitto*.

The *sponsores* and *fidepromissores* held a position, in many respects, the exact converse of the *adstipulator*. They made the same promise as their principal, or one not so extensive, for they might only choose to become guarantees to a certain extent; they could not bind themselves for more than their principal was bound for. They were often employed to remove any objections that might be made to the capacity of their promissor, as, for instance,

that he was *impubes* and contracting without the consent of his tutor. Their heirs were not bound (GAI. iii. 120), and they might recover from their principal by an *actio mandati* what they had advanced for him. (GAI. iii. 127.)

By the *lex Furia* (95 B.C.), which applied only to Italy, their obligation was only binding for two years from the time when it could have been enforced against them, and the amount of the liability of all was divided equally among all living at the time when the guarantee could be enforced. (GAI. iii. 121.)

These restrictions, the limitation of the intervention of *sponsores* and *fidepromissores* to verbal contracts, and their obligation dying with them, made it necessary that there should be a more unfettered mode of becoming surety for a party to a contract. This was supplied by the introduction of the *fidejussores*, who could bind themselves by stipulation in every kind of obligation, and who transmitted their obligation to their heirs. In the time of Justinian, *sponsores* and *fidepromissores* had been long obsolete, and as, under his legislation, stipulations *post mortem suam* were allowed, there was no longer any occasion for the intervention of *adstipulatores*, and, consequently, none of the additional parties to a verbal contract, except *fidejussores*, are mentioned in the Institutes.

Gaius mentions other laws besides the *lex Furia*, bearing on the subject of the additional parties to a contract; and as the effect of some of their provisions is traceable in what we read with respect to *fidejussores* in this Title, it may be as well to notice them here. (1) The *lex Apuleia* (102 B.C.) established a kind of partnership (*quandam societatem*) between the different *sponsores* or *fidepromissores*; any one of them who had paid the whole debt could recover from the others what he had paid in excess of his own share by an action *pro socio*. (GAI. iii. 122.) (2) A law, the name of which is illegible in the manuscript of Gaius, required that the creditor should give notice beforehand of the amount of the debt secured, and how many *sponsores* or *fidepromissores* there were to be; if they proved that such notice was not given, they were freed from liability. (3) The provisions of the *lex Furia* (95 B.C.) have been noticed above. (4) A *lex Cornelia* (81 B.C.), referring not only to *sponsores* and *fidepromissores*, but to all sureties, and therefore to *fidejussores* (which, perhaps, shows the date of the first introduction of *fidejussores*), provided that, with certain exceptions, no one could bind himself for the same debtor, to the same creditor, in the same year (*idem pro eodem, apud eundem, eodem anno*), for more than 20,000 sesterces; the promise was void as to the excess. (GAI. iii. 124, 125.) (5) Lastly, a *lex Publilia* gave *sponsores* an advantage over any other sureties, for they were allowed, unless reimbursed in six months, to recover from their principal what they had paid by a special action (*actio depensi*), and proceed to personal execution, *manus injectio*, against him. (GAI. iii. 127, and iv. 22.)

Intercedere was the general term for paying, becoming bound for, the debt of another; *satisdare* for the giving surety for the obligation of the principal; *satisaccipere* for the receiving it.

Suretyship might be created not only in the modes above mentioned, but by the surety offering himself as *mandator pecuniæ credendæ*, i.e. bidding the creditor to lend to the debtor, and becoming responsible for repayment, or by a *pactum constitutæ pecuniæ*, an undertaking to pay an ascertained debt, and in this case the debt of another person. (Bk. iv. Tit. 6. 9.)

The *senatusconsultum Velleianum* (D. xvi. 1. 2. 1), perhaps of the date of 46 A.D., forbad women ever to bind themselves for another person.

1. In omnibus autem obligationibus adsumi possunt, id est sive re sive verbis sive litteris sive consensu contractæ fuerint. Ac ne illud quidem interest, utrum civilis an naturalis sit obligatio, cui adjiciatur fidejussor, adeo quidem, ut pro servo quoque obligetur, sive extraneus sit, qui fidejussorem a servo accipiat, sive ipse dominus in id, quod sibi naturaliter debetur.

1. *Fidejussores* may be added in every kind of obligation, i.e. whether the obligation is contracted *re*, *verbis*, *litteris*, or *consensu*. Nor is it material whether the obligation to which the *fidejussor* is made an additional party is civil or natural; so much so, that a man may bind himself as a *fidejussor* for a slave, either to a stranger or to the master of the slave, in respect of a thing due by a natural obligation to the person accepting the *fidejussor* from the slave.

GAI. iii. 119; D. xlvi. 1. 8. 1, 2, and 70. 3.

In omnibus obligationibus, including obligations arising out of delicts. (D. xlvi. 1. 8. 5.) This was the principal advantage gained by the introduction of *fidejussores*.

2. Fidejussor non tantum ipse obligatur, sed etiam heredem obligatum relinquit.

2. A *fidejussor* not only binds himself, but leaves also his heir bound.

D. xlvi. 1. 4. 1.

This was the second chief point of difference between *fidejussores* and *sponsores*, or *fidepromissores*. There was no limit to the time during which *fidejussores* remained bound, such as the *lex Furia* had laid down for the benefit of *sponsores* and *fidepromissores*.

3. Fidejussor et præcedere obligationem et sequi potest.

3. A *fidejussor* may be added either before or after an obligation is entered into.

D. xlvi. 1. 6. pr. and 2.

Probably the formality of verbal contracts exacted that the words of the principal should precede those of the accessory.

4. Si plures sint fidejussores, quotquot erunt numero, singuli in solidum tenentur. Itaque liberum est creditori, a quo velit, solidum petere. Sed ex epistula divi Hadri-

4. Where there are several *fidejussores*, whatever is their number, each is bound for the whole debt, and the creditor may demand the whole from any of them he pleases. But,

ani compellitur creditor a singulis, qui modo solvendo sint litis contestatæ tempore, partes petere. Ideoque si quis ex fidejussoribus eo tempore solvendo non sit, hoc ceteros onerat. Sed et si ab uno fidejussore creditor totum consecutus fuerit, hujus solius detrimentum erit, si is, pro quo fidejussit, solvendo non sit: et sibi imputare debet, cum potuerit adjuvari ex epistula divi Hadriani et desiderare, ut pro parte in se detur actio.

by a rescript of the Emperor Hadrian, the creditor is forced to divide his demand between all those *fidejussores* who are solvent at the time of the *litis contestatio*, so that, if any of the *fidejussores* is not solvent at that time, the rest have so much additional burden. But, if the creditor obtains his whole demand from one of the *fidejussores*, the whole loss falls upon him alone, if the principal debtor cannot pay; for he has no one but himself to blame, as he might have availed himself of the rescript of the Emperor Hadrian, and might have required that no action should be given against him for more than his share of the debt.

GAI. iii. 121; D. xlvi. 1. 26.

The provision of the *lex Furia* not applying to *fidejussores*, they were bound for all they had promised; and as each promised for himself alone, the one first sued had no remedy against the other *fidejussores*, until the rescript of Hadrian provided one, and gave him what was called the *beneficium divisionis;* but under the *lex Furia*, the liability was divided among the different sureties *ipso jure*, whereas the surety first sued was obliged expressly to claim the benefit given by the rescript of Hadrian (*beneficium divisionis*).

There were two other privileges or *beneficia* of which the *fidejussor* might avail himself: one was that *cedendarum actionum*, by which, if the creditor, without suing the debtor, proceeded against the *fidejussor*, the surety, if prepared to pay the whole debt, could, before paying the creditor, compel him to make over to him the actions which belonged to the stipulator, and thus the *fidejussor* could sue those bound with him, or the principal debtor (D. xlvi. 1. 17), and this was often more advantageous to the *fidejussor* than having recourse to the rescript of Hadrian, because, if the creditor had taken pledges, they were transferred to the *fidejussor*, if the actions were ceded to him. If the creditor refused to cede the actions and still sued the surety, he could be repelled by an *exceptio doli mali*. (D. xlvi. 1. 59.)

There was also a *beneficium ordinis*, or, as it was otherwise termed, *excussionis* or *discussionis*, introduced by Justinian (Nov. 4. 1); by this a creditor was bound to sue the principal debtor first, and could only sue the sureties for that which he could not recover from the principal.

5. Fidejussores ita obligari non possunt, ut plus debeant, quam debet is, pro quo obligantur: nam eorum obligatio accessio est principalis obligationis nec plus in accessione esse potest quam in prin-

5. *Fidejussores* cannot bind themselves for more than the debtor is bound for; because their obligation is accessory to the principal obligation; and the accessory cannot contain more than the principal. They

cipali re. At ex diverso, ut minus debeant, obligari possunt. Itaque si reus decem aureos promiserit, fidejussor in quinque recte obligatur: contra vero non potest obligari. Item si ille pure promiserit, fidejussor sub condicione promittere potest: contra vero non potest. Non solum enim in quantitate, sed etiam in tempore minus et plus intellegitur. Plus est enim statim aliquid dare, minus est post tempus dare.

may, however, bind themselves for less. Therefore, if the principal debtor promises ten *aurei*, the *fidejussor* may be bound for five, but the *fidejussor* cannot be bound for ten when the principal debtor is bound only for five. Again, when the principal promises unconditionally, the *fidejussor* may promise conditionally, but the converse case is not possible. For the terms more and less are used not only with respect to quantity, but also with respect to time; it is more to give a thing instantly, it is less to give it after a time.

GAI. iii. 113, 126.

6. Si quid autem fidejussor pro reo solverit, ejus reciperandi causa habet cum eo mandati judicium.

6. If a *fidejussor* has made payment for the debtor, he may have an *actio mandati* against him to recover what he has paid.

GAI. iii. 127.

If he had intervened without the knowledge of the principal, he would have an *actio negotiorum gestorum*, not *mandati* (Tit. 27. 1); and he would have neither of these actions if he had intervened in defiance of the wishes of the principal, though it was doubtful whether he had not an *actio utilis*. (D. xvii. 1. 40.) Justinian declared that he should have no action at all. (C. ii. 19. 24.)

7. Græce fidejussor plerumque ita accipitur: *τῇ ἐμῇ πίστει κελεύω, λέγω, θέλω* sive *βούλομαι*: sed et si *φημί* dixerit, pro eo erit, ac si dixerit *λέγω*.

7. A *fidejussor* may bind himself in Greek, by using the expression *τῇ ἐμῇ πίστει κελεύω* (I order upon my faith), *λέγω* (I say), *θέλω* or *βούλομαι* (I wish); if he uses the word *φημί*, it will be equivalent to *λέγω*.

D. xlvi. 1. 8. pr.

The appropriate Latin formula was, '*Idem fide mea esse jubeo*,' but this formula was probably never insisted on, as the formulæ '*spondeo*' and '*idem fide mea promitto*' were.

8. In stipulationibus fidejussorum sciendum est generaliter hoc accipi, ut, quodcumque scriptum sit quasi actum, videatur etiam actum: ideoque constat, si quis se scripserit fidejussisse, videri omnia sollemniter acta.

8. It is a general rule in all stipulations of *fidejussores*, that whatever is stated in writing to have been done, is considered really to have been done. If, therefore, any one states in writing that he has bound himself as a *fidejussor*, it is presumed that all the necessary forms were observed.

D. xlv. 1. 30.

Cautio was the general term for the documentary evidence of a contract.

Tit. XXI. DE LITTERARUM OBLIGATIONE.

Olim scriptura fiebat obligatio, quæ nominibus fieri dicebatur: quæ nomina hodie non sunt in usu. Plane si quis debere se scripserit, quod numeratum ei non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest: hoc enim sæpissime constitutum est. Sic fit, ut et hodie, dum queri non potest, scriptura obligetur: et ex ea nascitur condictio, cessante scilicet verborum obligatione. Multum autem tempus in hac exceptione antea quidem ex principalibus constitutionibus usque ad quinquennium procedebat: sed ne creditores diutius possint suis pecuniis forsitan defraudari, per constitutionem nostram tempus coartatum est, ut ultra biennii metas hujusmodi exceptio minime extendatur.

Formerly there was made by writing a kind of obligation, which was said to be made *nominibus* (by booking debts). These *nomina* are now no longer in use. But if any one states in writing that he owes a sum which has never really been told out to him, he cannot, after a long time has elapsed, use the exception *non numeratæ pecuniæ*, i.e. that the money has not been told out. This has been often decided by imperial constitutions; and thus, even at the present day, as he cannot relieve himself from payment, he is bound by the writing, and the writing gives rise to a condiction, in the absence, that is, of any verbal obligation. The length of time fixed as barring this exception, was, under imperial constitutions antecedent to our time, not less than five years. But, that creditors might not be exposed too long to the risk of being defrauded of their money, we have shortened the time by our constitution, and this exception cannot now be used beyond the space of two years.

Gai. iii. 128-134; C. iv. 30. 14.

A contract was said to be formed *litteris* when it originated in a certain entry or statement of it being made in the books of the creditor with the consent of the debtor. Regularity in keeping accounts, and in entering all matters of business in a private ledger, was considered one of the first duties of a Roman citizen. Cicero speaks of a failure in this duty as an almost insupposable act of negligence and dishonesty. (See *pro Roscio*, 3. 1 and 3.) Events, as they occurred, were jotted down in rough memorandums called *adversaria*, and these were transferred at least once a month to the ledger (*codex* or *tabulæ*). It was probably only this ledger which had any legal importance. If any one put down in his ledger that he had advanced such a sum of money to another (*expensum ferre*), this entry (*expensilatio*) was an admissible proof of the fact. If the debtor also had made a corresponding entry in his ledger (*acceptum referre, acceptilatio*), the tallying of the two together made what was called an *obligatio litteris*. These two entries had, in fact, exactly the same effect as if the two parties had entered into a stipulation. But this was not all: the creditor was not to be placed entirely at the mercy of his debtor, whose wilful or accidental negligence, preventing a proper entry, might make the

obligation fail. The real source of the obligation was taken to be the consent of the debtor to the entry made by the creditor. If the debtor made a corresponding entry in his ledger, this was a conclusive proof that he had consented to the creditor's entry; but if he did not, then the creditor might still prove, in any way that he could, that he had really made his entry with the debtor's consent. Of course, if he had really paid the money over, this, if proved, would show beyond a doubt that the debtor had consented.

The foundation of this contract *litteris* being either the payment of a sum certain by the creditor, or simply the statement in the *codex* that a sum certain was due by the debtor, the obligation was always for a sum certain, and was therefore enforced by *condictio certi*, more usually termed simply *condictio*.

As the creditor put down the name of his debtor, the word '*nomen*' came to signify a book-debt; and Gaius speaks of '*nomina transcripticia*'. He says *transcriptio* took place (1) *a re in personam*, as when something being already owed, as, for instance, under a contract of sale or of letting to hire, the debtor assented to the creditor making an entry of the debt (GAI. iii. 129): this operated as a *novatio* (see Introd. sec. 89) of the old debt, and the creditor could now employ a *condictio* to enforce his claim; (2) the *transcriptio* took place *a persona in personam*, viz. when one man took on himself the debt of another. (GAI. iii. 130.) In both cases the effect was that the debtor recognised that a fictitious loan had been made to him. He assented to its being recorded in the *codex* that he had received in account what he owed on the sale, or what the third person, whose debt he was taking over, had received.

These contracts were peculiar to Roman citizens. *Peregrini* had, as a substitute, *syngraphæ*, signed by both parties, or *chirographa*, signed only by the debtor, and retained by the creditor. The *syngraphæ* and *chirographa* were not mere proofs of a contract, but were instruments on which an action could be brought, and the making of which operated as a novation of an existing debt.

In every period of the law, if there was a formal verbal contract, the written contract was thought subsidiary, and was merged in the stipulation: as the text says, *nascitur condictio, cessante scilicet verborum obligatione*.

An entry by a creditor might either profess to create an obligation (the *obligatio litteris* properly so called), or to operate as a *novatio*. In the former case, it was open to the alleged debtor to show that he had never consented, i.e. that there was no contract. In the latter case, when the debtor had not really received the money, the prætor permitted him to repel the action of the creditor by an exception called the '*exceptio non numeratæ pecuniæ*,' by which the debtor insisted that the money which formed the consideration of the obligation had never been told or counted out to him; and here, contrary to the usual rule as to

exceptions (Bk. iv. Tit. 13. pr. note), the burden of proof was considered to fall on the plaintiff, i.e. the creditor. It was for him to prove that he had paid the money, not for the debtor to prove that he had not.

This power of calling on the creditor to prove that he had really made the loan was extended to cases where the debtor had not gone through the form of the contract *litteris*, but had merely given a general acknowledgment of debt (*cautio*), such as is spoken of in the text. Although *cautiones* were not properly contracts, but proofs of a contract, yet, as they were protected by the same exception (C. iv. 30. 3), they were equivalent to and superseded contracts *litteris*. It will be noticed that the text uses the words *scriptura obligetur*, as if the obligation was created by the writing. This may account for Justinian at once telling us that contracts *litteris* were obsolete, and yet giving them a place in the Institutes.

After a certain number of years—first one, then five, and fixed by Justinian at two—the debtor was bound by the writing conclusively. (C. iv. 30. 14.) During this period, however, the debtor who had not really received the money need not wait to be sued; he might protest in a public act against any writing by which he admitted, or was alleged to have admitted, a debt, or bring an action against the creditor to compel him to give it up (C. iv. 30. 7); and a constitution in the Code (iv. 30. 14. 4) permitted him to make his exception perpetual by a formal announcement to the creditor of his intention to do so, and by his going through certain forms. If it was proved that the debtor had falsely denied having received what he had really received, Justinian ordered by a Novel (18. 8) that he should pay double the amount.

Tit. XXII. DE CONSENSU OBLIGATIONE.

Consensu fiunt obligationes in emptionibus venditionibus, locationibus conductionibus, societatibus, mandatis. Ideo autem istis modis consensu dicitur obligatio contrahi, quia neque scriptura neque præsentia omnimodo opus est, ac ne dari quidquam necesse est, ut substantiam capiat obligatio, sed sufficit eos, qui negotium gerunt, consentire. Unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per nuntium. Item in his contractibus alter alteri obligatur in id, quod alterum alteri ex bono et æquo præstare oportet, cum alioquin in verborum obligationibus alius stipuletur, alius promittat.

Obligations are formed by the mere consent of the parties in the contracts of sale, of letting to hire, of partnership, and of mandate. An obligation is, in these cases, said to be made by the mere consent of the parties, because there is no necessity for any writing, nor even for the presence of the parties; nor is it requisite that anything should be given to make the contract binding, but the mere consent of those between whom the transaction is carried on suffices. Thus these contracts may be entered into by those who are at a distance from each other by means of letters, for instance, or of messengers. In these contracts each party is bound to the other to render him all that equity demands, while in verbal obligations one party stipulates and the other promises.

Gai. iii. 135-138.

We now pass to contracts which belong to the *jus gentium*, which have nothing of the peculiar characteristics of the old civil law of Rome, and which are perfected by the simple consent of the parties. As is remarked in the concluding words of the text, these contracts by simple consent, unlike the contracts of which we have hitherto spoken, are bilateral; there is something which binds both parties; whereas the older and peculiarly Roman contracts were only unilateral. In a stipulation, for instance, it was only the *promissor* that was bound. *Commodatum*, *depositum*, and *pignus* were only bilateral in the sense that they gave rise to *actiones contrariæ* under certain circumstances, so that then both parties were bound by them. These contracts '*consensu*' were not enforced by actions *stricti juris*, such as were proper to the peculiarly Roman contracts of *mutuum*, stipulation, and contracts made *litteris*, but by actions '*bonæ fidei*,' i.e. prætorian actions, in which equitable principles were permitted to govern the decision. (See Introd. sec. 106.)

Tit. XXIII. DE EMPTIONE ET VENDITIONE.

Emptio et venditio contrahitur, simulatque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arra quidem data fuerit. Nam quod arræ nomine datur, argumentum est emptionis et venditionis contractæ. Sed hæc quidem de emptionibus et venditionibus, quæ sine scriptura consistunt, optinere oportet: nam nihil a nobis in hujusmodi venditionibus innovatum est. In his autem, quæ scriptura conficiuntur, non aliter perfectam esse emptionem et venditionem constituimus, nisi et instrumenta emptionis fuerint conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid ex his deest, et pœnitentiæ locus est et potest emptor vel venditor sine pœna recedere ab emptione. Ita tamen impune recedere eis concedimus, nisi jam arrarum nomine aliquid fuerit datum: hoc etenim subsecuto, sive in scriptis sive sine scriptis venditio celebrata est, is, qui recusat adimplere contractum, si quidem emptor est, perdit, quod dedit, si vero venditor, duplum restituere compellitur, licet nihil super arris expressum est.

The contract of sale is formed as soon as the price is agreed upon, although it has not yet been paid, nor even an earnest given; for what is given as an earnest only serves as proof that the contract has been made. This must be understood of sales made without writing; for with regard to these we have made no alteration in the law. But, where there is a written contract, we have enacted that a sale is not to be considered completed unless an instrument of sale has been drawn up, being either written by the contracting parties, or at least signed by them, if written by others; or if drawn up by a *tabellio*, it must be formally complete and finished throughout; for as long as any of these requirements is wanting, there is room to retract, and either the buyer or seller may retract without suffering loss: that is, if no earnest has been given. If earnest has been given, then, whether the contract was written or unwritten, the purchaser, if he refuses to fulfil it, loses what he has given as earnest, and the seller, if he refuses, has to restore double; although no agreement on the subject of the earnest was expressly made.

Gai. iii. 139; C. iv. 21. 17.

The contract of sale belonging to the *jus gentium* was attended with none of those material symbols which characterised the formation of contracts under the civil law. Directly one person agreed to sell a particular thing, and another to buy it, for a fixed sum of money, the contract was complete; no thing need be delivered, no money paid, in order that an obligation should arise. On the mutual consent being given, the seller was bound to deliver, the buyer to pay the price. The change which Justinian here introduced is that, when, in giving this mutual consent, they agree that the terms of the contract shall be reduced to writing, they shall be considered not to have consented to the contract until all the formalities have been gone through.

The *arræ* were either signs of a bargain having been struck, as, for instance, when the buyer deposited his ring with the seller (D. xix. 1. 11. 6), or consisted of an advance of a portion of the purchase-money. They were also intended as a proof that the purchase had been made. Justinian gave these deposits a new character by making them the measures of a forfeit in case either party wished to recede from his bargain, it being open to either party to retract if he chose to incur this forfeit. This power of retracting by forfeiture of the deposit, or double its value, was a great change in the law; and when Justinian says *nihil in hujusmodi venditionibus innovatum est*, he must be understood only to be referring to unwritten contracts of sale in which there was no deposit made as earnest. It will be seen from the text that this power of retractation was given whether the contract was made with writing or without.

Besides a buyer and a seller, there must, in a contract of sale, be a fixed price and a particular thing sold. The jurists are very minute in their distinctions of the nature of the thing sold. There is a distinction with regard to things future and uncertain forming the object of a sale, which is worth mentioning. Either a proportionate price may be agreed to be paid on a greater or lesser number of things that may be actually realised, as 'so much a head for all the fish I catch to-day,' which is termed *rei speratæ emptio*; or a definite sum may be agreed on as the price of the possibility of any number of things, more or less, being realised, as 'so much for the chance of all the fish I catch to-day'; and this was termed *spei emptio*. (D. xviii. 1. 8. 1.)

1. Pretium autem constitui oportet: nam nulla emptio sine pretio esse potest. Sed et certum pretium esse debet. Alioquin si ita inter aliquos convenerit, ut, quanti Titius rem æstimaverit, tanti sit empta: inter veteres satis abundeque hoc dubitabatur, sive constat venditio sive non. Sed nostra decisio ita hoc constituit, ut, quotiens sic composita sit venditio 'quanti ille æstimaverit,' sub hac condicione

1. It is necessary that a price should be agreed upon, for there can be no sale without a price. And the price must be fixed and certain. If the parties agree that the thing shall be sold at the sum at which Titius shall value it, it was a question much debated among the ancients, whether in such a case there is a sale or not. We have decided, that when a sale is made for a price to be fixed by a third person, the contract shall be binding

staret contractus, ut, si quidem ipse, qui nominatus est, pretium definierit, omnimodo secundum ejus æstimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur, emptore quidem ex empto actione, venditore autem ex vendito agente. Sin autem ille, qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem, quasi nullo pretio statuto. Quod jus cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere.

under this condition—that if this third person does fix a price, the price to be paid shall be that which he fixes, and the thing shall be delivered, so that the sale becomes complete, the purchaser having the *actio ex empto*, and the seller having that *ex vendito*. But if he will not or cannot fix a price, the sale is then void, as being made without any price being fixed on. This decision, which we have adopted with respect to sales, may reasonably be made to apply to contracts of letting on hire.

GAI. iii. 140; C. iv. 38. 15.

2. Item pretium in numerata pecunia consistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut fundus aut toga alterius rei pretium esse possit, valde quærebatur. Sabinus et Cassius etiam in alia re putant posse pretium consistere: unde illud est, quod vulgo dicebatur, per permutationem rerum emptionem et venditionem contrahi eamque speciem emptionis venditionisque vetustissimam esse: argumentoque utebantur Græco poeta Homero, qui aliqua parte exercitum Achivorum vinum sibi comparasse ait permutatis quibusdam rebus, his verbis:—

Ἔνθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
Ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἴθωνι σιδήρῳ,
Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι βόεσσι,
Ἄλλοι δ' ἀνδραπόδεσσι.

Diversæ scholæ auctores contra sentiebant aliudque esse existimabant permutationem rerum, aliud emptionem et venditionem. Alioquin non posse rem expediri, permutatis rebus, quæ videatur res venisse et quæ pretii nomine data esse: nam utramque videri et venisse et pretii nomine datam esse, rationem non pati. Sed Proculi sententia dicentis, permutationem propriam esse speciem contractus a venditione separatam, merito prævaluit, cum et ipse aliis Homericis versibus adjuvatur et validioribus rationibus argumentatur. Quod et anteriores divi principes admiserunt et in nostris digestis latius significatur.

2. The price should consist in a sum of money. It has been much doubted whether it can consist in anything else, as in a slave, a piece of land, or a toga. Sabinus and Cassius thought that it could. And it is thus that it is commonly said that exchange is a sale, and that this form of sale is the most ancient. The testimony of Homer was quoted, who in one place says that the army of the Greeks procured wine by an exchange of certain things. The passage is this:—

'The long-haired Achæans procured wine, some by giving copper, others by giving shining steel, others by giving hides, others by giving oxen, others by giving slaves'.

The authors of the opposite school were of a contrary opinion: they thought that exchange was one thing and sale another. Otherwise, in an exchange, it would be impossible to say which was the thing sold, and which the thing given as the price; for it was contrary to reason to consider each thing as at once sold, and given as the price. The opinion of Proculus, who maintained that exchange is a particular kind of contract distinct from sale, has deservedly prevailed, as it is supported by other lines from Homer, and by still more weighty reasons. This view has been adopted by former emperors, and has been fully treated of in our Digest.

GAI. iii. 141; D. xviii. 1. 1; C. iv. 64. 7.

A sale and an exchange differ so little that it might seem natural to treat the promise to exchange as raising an obligation equally with the promise to deliver a thing sold; it was indeed the opinion of the Sabinians that it did so; but this opinion did not prevail, and the law recognised no obligation as existing under an agreement to exchange unless one party had delivered to the other the thing he had promised. *Ex placito permutationis re nulla secuta, constat nemini actionem competere.* (C. iv. 64. 3.) Thus the distinction between sale and exchange was that in the former the contract was made *consensu*, in the other *re:* when one party had delivered the thing, the other was obliged to give the other thing. *Permutatio ex re tradita initium obligationi præbet.* (D. xix. 4. 1. 2.)

In a contract of sale the seller was not bound to make the buyer absolute master (*dominus*) of the thing sold, as he would have been in a stipulation. (D. xviii. 1. 25. 1.) What he was bound to do was this: 1st. He was bound to deliver the thing itself (*præstare, tradere*) (D. xix. 1. 11. 2), to give free and undisturbed possession of it (*possessionem vacuam tradere*) (D. xix. 1. 2. 1), and to give lawful possession of it (*præstare licere habere*). (D. xix. 1. 30. 1.) 2ndly. He was bound, if the buyer was disturbed in his possession by the real owner (which was termed *evictio*), to recompense him for what he lost. (D. xix. 1. 11. 2.) And 3rdly. To secure the buyer against secret faults; if such faults were discovered, either compensation might be claimed by an *actio æstimatoria*, reducing the price by a greater or less amount, according as the seller had or had not knowledge of the defect (D. xix. 1. 13), or, at the option of the buyer, the contract might be rescinded by an *actio redhibitoria*, and the thing returned (which was termed *redhibitio—redhibere est facere ut rursus habeat venditor quod habuerit*, D. xxi. 1. 21. pr.). In order to fortify his position, the buyer could stipulate with the seller, that he would give him the free and undisturbed possession of the thing, and that he would pay the buyer double the price if the buyer was evicted. The buyer would then have an action *ex stipulatu* to enforce the undertaking. Even if there was no such stipulation actually made, yet after it had become usual to make such stipulations, custom was held to have so far imported the promise into the contract of sale that the buyer, in bringing the action appropriate to his contract, *actio ex empto,* could obtain double the price in case of eviction, as this action was *bonæ fidei*, i.e. the parties could be placed in a fair position towards each other, and it was considered that to have given the promise to pay double the price in case of eviction was a duty of the seller. (D. xxi. 2. 2.)

The buyer was bound to make the seller the real owner of the money paid as the price (*emptor nummos venditoris facere cogitur*, D. xix 1. 11. 2), and was also bound to pay interest on the purchase-money from the day when he had received the thing sold. (D. xix. 1. 13. 20.)

The lines cited in the text are from *Il.* vii. 472; probably the *alii versus* alluded to are those describing the exchange between Glaucus and Diomede (*Il.* vi. 235).

3. Cum autem emptio et venditio contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si homo mortuus sit vel aliqua parte corporis læsus fuerit, aut ædes totæ aut aliqua ex parte incendio consumptæ fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquæ aut arboribus turbine dejectis longe minor aut deterior esse cœperit: emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. Quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. Sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet: nam et commodum ejus esse debet, cujus periculum est. Quodsi fugerit homo, qui veniit, aut subreptus fuerit, ita ut neque dolus neque culpa venditoris interveniat, animadvertendum erit, an custodiam ejus usque ad traditionem venditor susceperit. Sane enim, si susceperit, ad ipsius periculum is casus pertinet: si non susceperit, securus erit. Idem et in ceteris animalibus ceterisque rebus intellegimus. Utique tamen vindicationem rei et condictionem exhibere debebit emptori, quia sane, qui rem nondum emptori tradidit, adhuc ipse dominus est. Idem est etiam de furti et de damni injuriæ actione.

3. As soon as the sale is contracted, that is, in the case of a sale made without writing, when the parties have agreed on the price, all risk attaching to the thing sold falls upon the purchaser, although the thing has not yet been delivered to him. Therefore, if the slave sold dies or receives an injury in any part of his body, or the whole or a portion of the house is burnt, or the whole or a portion of the land is carried away by the force of a flood, or is diminished or deteriorated by an inundation, or by a tempest making havoc with the trees, the loss falls on the purchaser, and although he does not receive the thing, he is obliged to pay the price, for the seller does not suffer for anything which happens without any fraud or fault of his. On the other hand, if after the sale the land is increased by alluvion, it is the purchaser who receives the advantage, for he who bears the risk of harm ought to receive the benefit of all that is advantageous. But if a slave who has been sold runs away or is stolen, without any fraud or fault on the part of the seller, we must inquire whether the seller undertook to keep him safely until he was delivered over; if he undertook this what happens is at his risk; if he did not undertake it, he is not responsible. The same would hold in the case of any other animal or any other thing. But the seller is in any case bound to make over to the purchaser his right to a real or personal action, for the person who has not delivered the thing is still its owner; and it is the same with regard to the action of theft, and the action *damni injuriæ*.

D. xviii. 6. 8. pr.; D. xviii. 1. 35. 4.

The contract of sale was complete when the price had been fixed, but the thing sold did not pass to the buyer thereby. The seller retained the proprietorship (*dominium*) until he delivered it to the buyer, and the buyer received it, or until the property in it was passed by the buyer having paid the price, or given security for it, or in some way satisfied the seller (*œre soluto vel fidejussore dato vel alias satisfacto*, D. xiv. 4. 5. 18). Until this happened, the seller retained the thing in his custody, and if it had, meanwhile, any accretion, or suffered any diminution, he was still the

dominus of the thing which was increased or decreased. But his obligation bound him to deliver the thing exactly in the state in which it might happen to be at the time of delivery; and so it made no real difference to him whether there was an accretion or diminution. If the thing was lost by accident, the loss fell on the buyer and not on the seller, the *dominus;* so *res domino perit* could not be said of him. But, whatever happened to the thing sold, the price fixed on remained due. For, the obligation of the buyer being a distinct and independent obligation, the price could not alter, but remained fixed. The seller was, however, answerable for the care with which he preserved the thing while in his custody, *periculum rei ad emptorem pertinet, dummodo custodiam venditor ante traditionem prœstet* (D. xlvii. 2. 14. pr.); and he was not only bound to guard against gross and ordinary negligence (*dolum et culpam prœstare*, D. xiii. 6. 5. 2), but to preserve it more carefully even than his own property, *diligentiam prœstet exactiorem quam in suis rebus adhiberet* (D. xviii. 6. 3). He was bound to exercise the care of a *bonus paterfamilias.* In the text the case of a slave is taken, and a *bonus paterfamilias* might exercise the diligence proper to him, and yet a slave might run away. The loss would fall on the buyer, unless the seller had specially undertaken that he would keep him safely.

The *actio furti* and the *actio damni injuriœ* are noticed in Tit. 1 and 4 of the Fourth Book. If the thing was stolen or injured by a third person, without the fault of the seller, the buyer suffered the loss, but the seller was obliged to cede to the buyer the actions which as *dominus* he had against the thief or the doer of the injury.

4. Emptio tam sub condicione quam pure contrahi potest. Sub condicione veluti 'si Stichus intra certum diem tibi placuerit, erit tibi emptus aureis tot'.

4. A sale may be made conditionally or unconditionally: conditionally, as, for example, 'If Stichus suits you within a certain time, he shall be purchased by you at such a price'.

GAI. iii. 146.

The exact opposite might be contracted for: if within a certain time you find Stichus does not suit you, let it be considered you have not bought him. The jurists then said that the sale was a *pura emptio, quœ sub conditione resolvitur.* (D. xviii. 2. 2. pr.; D. xli. 4. 2. 5.) Stichus is sold, but within a certain time the contract may be rescinded.

The generic name for the accessory agreements which modified the principal contract was *pacta.* Some of these *pacta* relating to the contract of sale are treated of at considerable length in the Digest (D. xviii. 2 and 3), different names being appropriated to those most frequently in use; as, for instance, the *in diem addictio,* when the thing was sold, but if the seller had a better offer within a certain time, the contract might be rescinded (D. xviii. 2); and the *lex commissoria,* which was a general agreement for the rescis-

sion of the contract if either party violated its terms, and was especially used to enable the seller to demand back the thing sold, if the price was not paid by a certain day. (D. xviii. 3.)

We may observe that the Code (iv. 44. 2 and 8) permits a seller at all times to get a judicial order rescinding a contract if he has not received half the real value, but the contract will remain binding if the buyer elects to pay the residue of the proper price.

5. Loca sacra vel religiosa, item publica, veluti forum, basilicam, frustra quis sciens emit, quas tamen si pro privatis vel profanis, deceptus a venditore, emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur, quod sua interest, deceptum eum non esse. Idem juris est, si hominem liberum pro servo emerit.

5. A sale is void when a person knowingly purchases a sacred or religious place, or a public place, such as a forum or basilica. If, however, deceived by the vendor, he has supposed that what he was buying was profane or private, as he cannot have what he purchased, he may bring an action *ex empto* to recover whatever it would have been worth to him not to have been deceived. It is the same if he has purchased a free man, supposing him to be a slave.

D. xviii. 1, 4, 5, 6. pr. ; D. xviii. 1. 62. 1.

This paragraph is probably inserted in order to contrast the effects of a contract of sale with those of a stipulation. In the strict civil law, ignorance that a thing was not a subject of commerce would not help the person who had stipulated for it. But in a contract of sale, if the seller had, and the buyer had not, known the real character of the thing he was buying, the buyer could recover against the seller anything he lost by entering into the bargain; for instance, he would not only receive back the purchase-money, but also would be entitled to interest upon it from the date of its payment.

The contract of sale gave rise to two actions *bonæ fidei*, the *actio ex vendito* or *venditi*, belonging to the seller, and the *actio ex empto* or *empti*, mentioned in the text, belonging to the buyer. The buyer had also the *actio æstimatoria*, and the *actio redhibitoria*. (See note to par. 2.)

Tit. XXIV. DE LOCATIONE ET CONDUCTIONE.

Locatio et conductio proxima est emptioni et venditioni iisdemque juris regulis consistit. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic etiam locatio et conductio ita contrahi intellegitur, si merces constituta sit. Et competit locatori quidem locati actio, conductori vero conducti.

The contract of letting on hire approaches very nearly to that of sale, and is governed by the same rules of law. As the contract of sale is formed as soon as a price is fixed, so a contract of letting on hire is formed as soon as the amount to be paid for the hiring has been agreed on: and the letter has an action *locati*, and the hirer an action *conducti*.

D xix. 2. 2. pr. and 15. pr.

The contract of letting on hire (*locatio conductio*), like that of sale, was complete by the mere consent of the parties, and, like it, produced only personal obligations, and not any real rights. The hirer was, however, not even entitled to the *possessio;* the letter still remained the possessor in the eye of the law, his duty not being *præstare rem licere habere*, but *præstare re frui, uti licere.*

There were three principal heads of this contract: 1, *locatio conductio rerum*, when one person let a thing and another hired it; 2, *locatio conductio operarum*, when one person let his services and another hired them, without reference to any object in respect of which the services were to be performed; 3, *locatio conductio operis faciendi*, when one person put out (*locavit*) a particular piece of work to be done, and another contracted to do it. If in the last-named contract we look at the labour, &c., expended on the work, we should naturally call the person who did the work the *locator*, as it was he who let out his services for its performance; but the Roman jurists generally looked at the work itself that was to be done, and spoke of the person who contracted for its performance, i.e. gave it out, as its *locator*, and the person who engaged to perform or execute it, i.e. took it in, as the *conductor*. The price of, or consideration for, the letting, was properly called *merces*, sometimes *pretium* (D. xix. 2. 28. 2), and, in the case of the letting of houses or land, *pensio* or *reditus*. In particular contracts, the *conductor* had special names, as the hirer of a house was called *inquilinus*, of a farm *colonus*.

The duty of the letter was to guarantee the hirer against eviction, and to reimburse him for any useful or necessary expenses he had incurred; the duty of the hirer was to take care as a *bonus paterfamilias* of the thing hired (see par. 5), to give up the thing hired at the end of the term for which it was let, and to pay the price agreed on.

The text gives us the names of the personal actions which belonged to the letter and the hirer respectively, the former having the *actio locati*, the latter the *actio conducti*. But actions of a very different kind were sometimes connected with this contract. In the case of land let to hire, certain instruments of farming and other property of the hirer were held as a security for the payment of the rent, and a real action, termed the *actio Serviana*, because first introduced by the prætor *Servius*, was given to the letter to enforce his right to these things in case of non-payment of the rent; this action was gradually extended in its effects, and the extended action, under the name of *actio quasi-Serviana*, was used to enforce the rights of a creditor over anything given in pledge. (See Bk. iv. Tit. 6. 7.) The prætor, too, gave an interdict, termed the *interdictum Salvianum* (similarly extended under the name of *interdictum quasi-Salvianum*), by which the letter got possession of things pledged for the rent of land. (See Bk. iv. Tit. 15. 3.)

1. Et quæ supra diximus, si alieno arbitrio pretium permissum fuerit, eadem et de locatione et conductione dicta esse intellegamus, si alieno arbitrio merces permissa fuerit. Qua de causa si fulloni polienda curandave aut sarcinatori sarcienda vestimenta quis dederit nulla statim mercede constituta, sed postea tantum daturus, quantum inter eos convenerit, non proprie locatio et conductio contrahi intellegitur, sed eo nomine præscriptis verbis actio datur.

1. What we have said above of a sale in which the price is to be fixed by the decision of a third person, may be applied to the contract of letting on hire, if the amount to be paid for the hire is left to the decision of a third person. Accordingly, if any one gives clothes to a fuller to be scoured or cleaned, or to a tailor to be mended, without then fixing the sum to be paid for their work, but with the intention of afterwards paying what may be agreed on, a contract of letting on hire cannot properly be said to be made; but the circumstances furnish ground for an action *præscriptis verbis.*

GAI. iii. 143; D. xix. 2. 25. pr.

Qua de causa, i.e. 'the price ought to be determined, and therefore,' &c.; the passage is taken rather unconnectedly out of Gaius.

Actio præscriptis verbis. (See note 7 on Tit. 13. pr.) Or an *actio mandati* might be brought. (Tit. 26. 13.)

2. Præterea sicut vulgo quærebatur, an permutatis rebus emptio et venditio contrahitur: ita quæri solebat de locatione et conductione, si forte rem aliquam tibi utendam sive fruendam quis dederit et invicem a te aliam utendam sive fruendam acceperit. Et placuit, non esse locationem et conductionem, sed proprium genus esse contractus. Veluti si, cum unum quis bovem haberet et vicinus ejus unum, placuerit inter eos, ut per denos dies invicem boves commodarent, ut opus facerent, et apud alterum bos periit: neque locati vel conducti neque commodati competit actio, quia non fuit gratuitum commodatum, verum præscriptis verbis agendum est.

2. Moreover, just as the question was often asked whether a contract of sale was formed by exchange, a similar question arose with respect to the contract of letting on hire, in case any one gave you a thing to use or take the fruits of, and in return receive from you something else of which he was to have the use or fruits. It has been decided that this is not a contract of letting to hire, but a distinct kind of contract. For example, if two neighbours have each an ox, and agree each to lend the other his ox for ten days to make use of, and one of the oxen dies while in the care of the person to whom it does not belong, there will not be an *actio locati* or *conducti*, nor will there be an *actio commodati*, since the loan was not gratuitous, but the parties have to sue by an action *præscriptis verbis.*

GAI. iii. 144; D. xix. 5. 17. 3.

3. Adeo autem familiaritatem aliquam inter se habere videntur emptio et venditio, item locatio et conductio, ut in quibusdam causis quæri soleat, utrum emptio et venditio contrahatur, an locatio et conductio. Ut ecce de prædiis, quæ perpetuo quibusdam fruenda traduntur, id est ut, quamdiu pensio sive reditus pro his domino præstetur, neque ipsi conductori neque heredi ejus,

3. Contracts of sale and contracts of letting on hire are so nearly connected, that in some cases it is questioned whether the contract is one or the other. For instance, when lands are delivered over to be enjoyed for ever, that is, that as long as the rent is paid for the land to the owner, he cannot take away the land from the hirer or his heir, or from any one to whom the hirer or his heir has sold

cuive conductor heresve ejus id prædium vendiderit aut donaverit aut dotis nomine dederit aliove quo modo alienaverit, auferre liceat. Sed talis contractus quia inter veteres dubitabatur et a quibusdam locatio, a quibusdam venditio existimabatur: lex Zenoniana lata est, quæ emphyteuseos contractui propriam statuit naturam neque ad locationem neque ad venditionem inclinantem, sed suis pactionibus fulciendam, et si quidem aliquid pactum fuerit, hoc ita optinere, ac si natura talis esset contractus, sin autem nihil de periculo rei fuerit pactum, tunc si quidem totius rei interitus accesserit, ad dominum super hoc redundare periculum, sin particularis, ad emphyteuticarium hujusmodi damnum venire. Quo jure utimur.

or given the land, or made it over as part of a *dos*, or has in any way alienated it. As the ancients were in doubt as to this contract, some regarding it as a letting on hire, and some as a sale, the constitution of Zeno was made, which declared that the contract of *emphyteusis* was of a special nature, and was not to be confounded either with letting on hire or with sale, but rested upon its own peculiar agreements; and that if any special agreement was made, it was to be observed as if to have such an agreement was part of the nature of the contract; but if no agreement was made as to the risks the thing might undergo, the risk of a total loss should fall upon the owner, and the detriment of a partial loss upon the occupier; and this we still wish to be considered the law.

GAI. iii. 145; C. iv. 66. 1.

We have already given an account of *emphyteusis* in the note to Bk. ii. Tit. 5. 6.

The law would naturally contemplate the contract under which the *emphyteuta* entered as a *locatio conductio;* but the *dominus* seemed to have parted with so much of his interest, that it appeared doubtful whether it ought not rather to be considered as a sale. Zeno (about A.D. 476) enacted that it should be regarded as a separate form of contract.

4. Item quæritur, si cum aurifice Titio convenerit, ut is ex auro suo certi ponderis certæque formæ anulos ei faceret et acciperet verbi gratia aureos decem, utrum emptio et venditio contrahi videatur, an locatio et conductio? et Cassius ait, materiæ quidem emptionem venditionemque contrahi, operæ autem locationem et conductionem. Sed placuit, tantum emptionem et venditionem contrahi. Quodsi suum aurum Titius dederit, mercede pro opera constituta, dubium non est, quin locatio et conductio sit.

4. It is also questioned whether, when Titius has agreed with a goldsmith to make him rings of a certain weight and pattern, out of gold belonging to the goldsmith himself, the goldsmith to receive, for example, ten *aurei*, the contract is one of sale or letting on hire. Cassius says that there is a sale of the material, and a letting on hire of the goldsmith's work; but it has been decided that there is only a contract of sale. But if Titius gives the gold, and a sum is agreed on to be paid for the work, there is no doubt that the contract is then one of letting to hire.

GAI. iii. 147; D. xix. 2. 2. 1.

5. Conductor omnia secundum legem conductionis facere debet et, si quid in lege prætermissum fuerit, id ex bono et æquo debet præstare. Qui pro usu aut vestimentorum aut argenti aut jumenti mercedem aut dedit aut promisit, ab eo custodia talis desideratur, qualem diligentis-

5. The hirer ought to do everything according to the terms of his hiring, and if anything has been omitted in these terms, he ought to supply it according to the rules of equity. He who has given or promised a sum for the hire of clothes or silver or a beast of burden, is required to bestow as

simus paterfamilias suis rebus adhibet. Quam si præstiterit et aliquo casu rem amiserit, de restituenda ea non tenebitur.

great care on the safe custody of the thing he hires as the most careful *paterfamilias* bestows on the custody of his own property. If he bestows such care, but loses the thing through some accident, he is not bound to restore it.

D. xix. 2. 25. 3, 7

The distinction between the cases of a sale and of a letting on hire is to be noticed. Here the risk of fortuitous loss is with the owner, i.e. the *locator*, in accordance with the general rule; but in sale the risk of fortuitous loss is not with the owner, the seller, but with the buyer.

6. Mortuo conductore intra tempora conductionis, heres ejus eodem jure in conductionem succedit.

6. If the hirer dies during the time of his hiring, his heir succeeds him in the hiring on the same terms.

C. iv. 65. 10.

And the same may be said of the *locator;* but in a *locatio conductio* of personal services or of a thing to be done by a special person, the death of the person who let out his services terminated the contract.

The contract, in the case of a *locatio conductio rei*, was also terminated by the sale of the thing hired. The buyer was not considered bound by the contract. *Emptori fundi necesse non est stare colonum cui prior dominus locavit, nisi ea lege emit* (C. iv. 65. 9); but the *conductor* could demand compensation from the *locator*. The contract ceasing if the thing was sold serves clearly to distinguish the interest of the *conductor* from a usufruct. The *conductor* had no real interest in the thing, but only a personal right against the *locator*, while the usufructuary had a servitude, i.e. a real right, in the thing. The whole of the thing over which the usufruct extended could not be sold, because part of it, namely the usufruct, had already been parted with.

The contract was also terminated if the rent was two years in arrear (D. xix. 2. 54. 1); if the *conductor* grossly misused the thing hired (C. iv. 65. 3); if the *locator* had indispensable need of it, *si propriis usibus dominus esse necessariam eam probaverit* (C. *ib.*); or if the *conductor* was prevented from getting benefit from it, as by armed force. (D. xix. 2. 13. 7.)

TIT. XXV. DE SOCIETATE.

Societatem coire solemus aut totorum bonorum, quam Græci specialiter κοινοπραξίαν appellant, aut unius alicujus negotiationis, veluti mancipiorum emendorum vendendorumque, aut olei, vini, frumenti emendi vendendique.

A partnership is formed either of the whole goods of the contracting parties, to which the Greeks give the special name of κοινοπραξία, or for some particular business, as the sale or purchase of slaves, oil, wine, or wheat.

GAI. iii. 148.

The text, borrowed from Gaius, gives the general division of partnerships into two classes according as they are universal or particular. In the Digest we have a further division by distinguishing five kinds of partnership. (D. xvii. 2. 5, 7.)

1. *Societas universorum bonorum*, in which everything belonging or accruing in any way to each partner is held in common. Here the property belonging to each partner at the time when the partnership was formed became the property of all, without delivery (D. xvii. 2. 1. 1, 2); after-acquired property had to be delivered to the partnership (D. xvii. 2. 74).

2. *Societas universorum quæ ex quæstu veniunt*, i.e. of all things which are gained or acquired by each partner through business transactions; but not of things belonging or accruing in other ways, such as inheritances or legacies. (D. xvii. 2. 7, 8, 9.)

3. *Societas negotiationis alicujus*, formed to carry on a particular business.

4. *Societas vectigalis*, formed to carry on the farming of one or more branches of the public revenues—a mere branch of the last, but subject to special rules. (D. xvii. 2. 59.)

5. *Societas rei unius*, when one or more particular things are held in common.

1. Et quidem si nihil de partibus lucri et damni nominatim convenerit, æquales scilicet partes et in lucro et in damno spectantur. Quodsi expressæ fuerint partes, hæ servari debent: nec enim umquam dubium fuit, quin valeat conventio, si duo inter se pacti sunt, ut ad unum quidem duæ partes et damni et lucri pertineant, ad alium tertia.

1. If the proportions of gain and loss have not been specially agreed on, the shares of gain and loss are looked on as equal. But if they have been agreed on, effect ought to be given to the agreement; for, indeed, the validity of the agreement has never been questioned, if two partners have agreed that two-thirds of the gain and loss should belong to the one and one-third to the other.

GAI. iii. 150.

Æquales partes, i.e. one equal share of the whole, not proportional to what each contributes. (D. xvii. 2. 80.)

Hæ servari debent: subject, however, to this qualification, that one partner can get a greater share of the profits than the others only if he has given more to the partnership, whether in money or in labour. (D. xvii. 2. 29. pr.)

2. De illa sane conventione quæsitum est, si Titius et Seius inter se pacti sunt, ut ad Titium lucri duæ partes pertineant, damni tertia, ad Seium duæ partes damni, lucri tertia, an rata debet haberi conventio? Quintus Mucius contra naturam societatis talem pactionem esse existimavit et ob id non esse ratam habendam. Servius Sulpicius, cujus sententia prævaluit, contra sentit, quia sæpe quorundam ita pretiosa est opera in societate, ut

2. But doubts have been raised as to the following agreement. Supposing Titius and Seius have agreed that two-thirds of the profit and one-third of the loss shall belong to Titius, and two-thirds of the loss and one-third of the profit shall belong to Seius, ought such an agreement to be valid? Quintus Mucius considered it as contrary to the nature of partnership, and as therefor not to be held valid. Servius Sulpicius, on the contrary, whose opinion has prevailed, thought it valid,

eos justum sit meliore condicione in societatem admitti: nam et ita coiri posse societatem non dubitatur, ut alter pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit, quia sæpe opera alicujus pro pecunia valet. Et adeo contra Quinti Mucii sententiam obtinuit, ut illud quoque constiterit, posse convenire, ut quis lucri partem ferat, damno non teneatur, quod et ipsum Servius convenienter sibi existimavit: quod tamen ita intellegi oportet, ut, si in aliqua re lucrum, in aliqua damnum allatum sit, compensatione facta, solum quod superest, intellegatur lucri esse.

as frequently the services of particular partners are so valuable that it is just to give them advantages in the terms of the partnership. There can be no doubt that a partnership may be formed on the terms of one partner contributing money, and of the other not contributing, while yet the profit is common to both, as often a man's labour is equivalent to money. An opinion, therefore, so directly contrary to that of Quintus Mucius has prevailed, that it is admitted that by special agreement a partner may share the profit, and yet not be responsible for the loss, as Servius consistently held. This must be understood as meaning that, if there is profit on one transaction and loss on another, the accounts must be balanced, and only the net profit be reckoned as profit.

GAI. iii. 149; D. xvii. 2. 30.

A partnership in which one partner was totally excluded from gain was void. The jurists called it a *leonina societas*, as the other partner would have the lion's share. (D. xvii. 2. 29. 2.)

With respect to the power of one partner to bind another, a point not touched on by Justinian, we may observe that, as between the partners themselves, any one who acted in behalf of the rest was their mandatary, and, beyond acts of pure administration of their affairs, could only be empowered to act by their express desire (*mandatum*). If he was so empowered, he had an action against them for all expenses and losses he incurred, and was bound to account to them for the profits. With regard to third persons, as the Roman law, strictly speaking, took no notice of any one who was not a party to the particular contract, they could not sue, or be sued by, the remaining partners, who were not parties. The prætor, however, allowed the remaining partners to sue if they had no other means of protecting their interests (D. xiv. 3. 1, 2); and the stranger to sue, if the partners had benefited by the contract. (D. xvii. 2. 82.)

3. Illud expeditum est, si in una causa pars fuerit expressa, veluti in solo lucro vel in solo damno, in altera vero omissa: in eo quoque, quod prætermissum est, eandem partem servari.

3. Of course if the share on one side only is expressly agreed on, as on the side of profit only, or on that of loss only, the same share is to be considered as held on the side of which no mention is made.

GAI. iii. 150.

4. Manet autem societas eo usque, donec in eodem consensu perseveraverint: at cum aliquis renuntiaverit societati, solvitur societas. Sed plane si quis callide in hoc renuntiaverit societati, ut ob-

4. A partnership continues as long as the partners continue to agree that it shall do so; but if any one partner renounces the partnership, then the partnership is dissolved. If, however, he makes this renunciation with a

veniens aliquod lucrum solus habeat, veluti si totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrifaceret, cogitur hoc lucrum communicare: si quid vero aliud lucrifaceret, quod non captaverit, ad ipsum solum pertinet: ei vero, cui renuntiatum est, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur.

secret motive, such as that he may alone enjoy a gain which he knows awaits him; as, for instance, if an inheritance has been left to a member of a partnership embracing all the property of each of the partners, and he renounces the partnership to enjoy alone the advantages of an inheritance left him; he is compelled to share this source of gain with his partners. But if he gains anything without such previous design, he alone profits by it: while the partner who has received his renunciation alone takes all that is acquired after the renunciation of the partnership has been made.

GAI. iii. 151; D. xvii. 2. 65. 3.

The contract of partnership may have different modifications. It may be made during or from a certain time or conditionally. (D. xvii. 2. 1. pr.) But there can be no partnership to last for ever, as no one can be forced to remain a partner against his will. (D. xvii. 2. 70.) Any partner may renounce, i.e. withdraw, when he pleases, but if the time during which the partnership is to last has been fixed, he cannot escape liability during that period, and even if no time has been fixed he must not so retire as to force on a disadvantageous sale of partnership property. (D. xvii. 2. 65. 5 and 6.)

The remaining paragraphs of this Title treat of the modes in which the partnership may be dissolved. Ulpian, enumerating the causes of the dissolution of partnership, says, '*Societas solvitur ex personis, ex rebus, ex voluntate, ex actione*'. (D. xvii. 2. 63. 10.) *Ex personis*, when one of the parties is dead or incapacitated, as by confiscation (*publicatio*) of goods, when the treasury succeeds to his *persona* (paragr. 7); *ex rebus*, when the purpose of the partnership is effected, or its subject-matter has ceased to exist, as in the case of cession of goods (paragr. 8); *ex voluntate*, when one partner renounces; and *ex actione*, when one partner compels a dissolution of partnership by action. We may add *ex tempore*, if the partnership was only temporary.

5. Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi elegit. Sed et si consensu plurium societas coita sit, morte unius socii solvitur, etsi plures supersint, nisi si in coeunda societate aliter convenerit.

5. A partnership is also dissolved by the death of a partner, as he who enters into a partnership chooses a particular person to whom he binds himself. And even if there are more than two partners, the death of any one dissolves the partnership although more than one survive, unless on the formation of the partnership it has been otherwise agreed.

GAI. iii. 152; D. xvii. 2. 65. 9.

Although, in forming the partnership, the parties might agree that, if any one ceased to be a partner, the rest should still continue partners, or, to speak more accurately, should immediately and

without fresh agreement form a new partnership, yet no one could validly make it part of the contract that his heirs should, on his death, be admitted partners, the contract being personal. There was an exception made to this rule in the case of *societates vectigales.* (D. xvii. 2. 59. pr.)

6. Item si alicujus rei contracta societas sit et finis negotio impositus est, finitur societas.

6. If the partnership has been formed for a single transaction, when the transaction is completed, the partnership is ended.

D. xvii. 2. 65. 10.

7. Publicatione quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur: nam cum in ejus locum alius succedit, pro mortuo habetur.

7. It is evident, also, that a partnership is dissolved by confiscation, as if all the property of a partner is confiscated; for this partner, as another person succeeds into his place, is considered dead.

D. xvii. 2. 65. 12.

8. Item si quis ex sociis, mole debiti prægravatus, bonis suis cesserit et ideo propter publica aut propter privata debita substantia ejus veneat, solvitur societas. Sed hoc casu si adhuc consentiant in societatem, nova videtur incipere societas.

8. So, too, if one of the partners, borne down by the weight of his debts, makes a cession of his goods, and his property is therefore sold to satisfy his debts, public or private, the partnership is dissolved. But in this case, if the parties agree still to continue partners, a new partnership would seem to be begun.

GAI. iii. 153, 154.

The *persona* of an individual might, we know, be destroyed even in his lifetime and passed on to a successor, as, for instance, by the *maxima* and *media capitis deminutio,* and by the *publicatio* or confiscation of all the goods of the *deminutus,* which was one of their consequences, so that the *fiscus* was his successor (D. xlviii. 20. 1), or by the sale of his property in the mass either for the profit of the treasury in the case of criminals (*sectio bonorum,* the old form of *publicatio*), or of private individuals in certain cases of insolvency (*emptio bonorum*), or when he had made a *cessio bonorum* under the *lex Julia.* (See Tit. 12 of this Book.) In the time of Justinian sales in one mass of a whole patrimony were obsolete, and therefore confiscation (*publicatio*), when the *fiscus* was the successor, and *cessio bonorum* are alone mentioned here; the latter, however, as taking away the fortune of the partner, and not as destroying his *persona.*

Of course the partnership might be immediately renewed with the partner whose goods had been confiscated or ceded to creditors, if the other partners were willing to enter into what was really a new partnership, as it might if the partner had lost his *civitas* by the *media deminutio;* for partnership, being a contract of the *jus gentium,* could be formed with a stranger. (GAI. iii. 154.) The *minima capitis deminutio* did not cause a dissolution of the

partnership, and a person arrogated or emancipated still remained a partner. (D. xvii. 2. 65. 11; POSTE'S *Gaius*, 426.) The arrogator, however, did not become a partner, as a new partner could not be introduced without the consent of the others. *Societas quemadmodum ad heredes socii non transit, ita nec ad arrogatorem, ne alioquin invitus quis socius efficiatur cui non vult.* (D. xvii. 2. 65. 11.)

9. Socius socio utrum eo nomine tantum teneatur pro socio actione, si quid dolo commiserit, sicut is, qui deponi apud se passus est, an etiam culpæ, id est desidiæ atque negligentiæ nomine, quæsitum est: prævaluit tamen, etiam culpæ nomine teneri eum. Culpa autem non ad exactissimam diligentiam dirigenda est: sufficit enim talem diligentiam in communibus rebus adhibere socium, qualem suis rebus adhibere solet. Nam qui parum diligentem socium sibi adsumit de se queri, hoc est suæ id imprudentiæ imputare debet.

9. It has been questioned whether one partner can only be made answerable to another by the action *pro socio*, if he has been guilty of malicious wrong, as a depositary is, or whether also for a fault, that is, for carelessness and negligence. The opinion has prevailed that he is also answerable for a fault, but the fault is not to be measured by a standard of the most perfect carefulness possible. It is sufficient that he should be as careful of things belonging to the partnership as he is of his own property. For he who accepts as partner a person of careless habits, has only himself to blame, that is must set it down to the score of his own imprudence.

D. xvii. 2. 72.

Societas jus quodammodo fraternitatis in se habet. (D. xvii. 2. 63. pr.) Hence, while each partner had, if sued, an allowance (termed the *beneficium competentiæ*) made for him, and was only held responsible to the extent of his means (Bk. iv. Tit. 6. 38), yet, on the other hand, if he was condemned in an action *pro socio*, he was marked with infamy. (D. xvii. 2. 63. pr., 1-3; D. iii. 2. 1.)

The action *pro socio* was the remedy in almost every case that could arise between partners. It was employed, for instance, to enforce accounts, to get compensation for losses, and to dissolve the partnership. If any partner was guilty of a delict against his partners, such as theft, he would be made amenable by such actions as the *actio furti*, *vi bonorum raptorum*, or *legis Aquiliæ*, of which we read in the Fourth Book. There was also another action incident to partnerships called the *actio communi dividundo*, which was brought to procure a partition, by the *judex*, of the common property. (D. xvii. 2. 43; Introd. sec. 103.)

TIT. XXVI. DE MANDATO.

Mandatum contrahitur quinque modis, sive sua tantum gratia aliquis tibi mandet, sive sua et tua, sive aliena tantum, sive sua et aliena, sive tua et aliena. At si tua tantum gratia tibi mandatum sit, superva-

The contract of mandate is formed in five modes; according as a mandator gives you a mandate for his benefit only, or for his benefit and for yours, or for the benefit of a third person only, or for his benefit and that of a

cuum est mandatum et ob id nulla ex eo obligatio nec mandati inter vos actio nascitur.

third person, or for your benefit and that of a third person. A mandate made for your benefit only is useless, and does not produce between you any obligation or action *mandati*.

D. xvii. 1. 2. pr.; GAI. iii. 155, 156.

In the theory of Roman law one person could not represent another. The person who actually made the contract, who uttered the binding words, or went through the binding formalities, was the only legal contractor; he alone could sue and be sued. The law would not take notice that it was really in behalf of another that he made the contract.

But a friend on whom reliance could be placed might be persuaded to make the contract in his own name. Honour and friendship would then effect what the law would not compel. This friend would give up all that he gained by the contract to the person at whose request he entered into it. The promise to perform this act of friendship was given, in the old times of Roman manners, with an appropriate formality. The person really interested took the friend by the right hand, and told him that he placed in his hand the trust he was anxious to have discharged. The trust, or commission itself, was hence called *mandatum* (*manu datum*). Plautus thus describes the ceremony (*Captiv.* ii. 3):—

TYND. *Hæc per dexteram tuam, te dextera retinens manu,*
Obsecro, infidelior mihi ne fuas, quam ego sum tibi.
Tu hoc age, tu mihi herus nunc es, tu patronus, tu pater;
Tibi commendo spes opesque meas.
PH. *Mandasti satis.*

The execution of a *mandatum* was thus a discharge of an office of friendship. *Originem ex officio atque amicitia trahit.* (D. xvii. 1. 1. 4.) And it never lost the traces of its origin. It was always necessarily gratuitous: the *mandatarius*, i.e. the person charged with the *mandatum*, was obliged to bestow on it the care of the most diligent *paterfamilias* (C. iv. 35. 13), and if he failed to discharge the trust, and was condemned in an *actio mandati*, he was stamped with infamy. (D. iii. 2. 1; Introd. sec. 48.)

When the introduction of the prætorian system furnished a method by which every equitable claim could be enforced, friends who entered into such an agreement were obliged to discharge their reciprocal duties. The prætor, by the *actio mandati directa* given to the mandator, compelled the *mandatarius* to account for all he received, and to pay over the profits, and, by the *actio mandati contraria* given to the *mandatarius*, compelled the *mandator* (i.e. the person who requested the favour) to reimburse, with interest, the *mandatarius* for all expenses incurred, to indemnify him for all losses, and to free him from all obligations contracted in the execution of the mandate. It is in this sense that the contracts of *mandatum* may be said to be bilateral.

The prætorian law went a great step further, by allowing the

mandator to bring equitable actions against, and to be sued by, the third party, with whom the *mandatarius* contracted. First as to actions brought by the *mandator*. Whatever direct actions the *mandatarius* would properly have brought or was liable to, the *mandator* was allowed to bring in the shape of *actiones utiles;* and if the *mandator* sued or intended to sue, the *mandatarius* could not sue. As, for instance, where the *mandatarius* would have brought a *condictio*, or an *actio empti* or *venditi*, the *mandator* was allowed to bring a *condictio utilis*, or an *actio utilis empti* or *venditi*. (D. xix. 1. 13. 25.) In the case of a special mandate, these actions were allowed as of course; in the case of a general mandate, only when the *mandator* had no other way of protecting his interests (D. xiv. 3. 2): a mandate being termed special when one man charged another with the execution of one or more particular things, and general when he asked him to represent him in all his affairs.

Secondly as to actions brought against the *mandator*. There were some acts, of a solemn character, in which one citizen could at no time of Roman law act for another, such as bringing any of the *legis actiones*, mancipation, making testaments, or the *cretio* or *aditio* of an inheritance. (Bk. ii. Tit. 9. 5 note.) Nor did the civil law ever permit any one, except a son or a slave (Tit. 28), to contract for another so as to make the person for whom he contracted directly responsible or directly able to sue on the obligation. But the prætorian system gradually recognised the intervention of an agent. A *cognitor*, i.e. a person authorised formally to conduct a suit, was allowed to act on behalf of the plaintiff or defendant, and fully represented his principal. (See Bk. iv. Tit. 10. pr. note.) The manager of a shop (*institor*) and the captain of a ship (*magister navis*) were permitted to bind their employers (Bk. iv. Tit. 7. 2), and by an extension of the actions appropriate to these cases, i.e. by allowing a *utilis actio quasi institoria* (D. xvii. 1. 10. 5), the prætor made all employers liable for acts of their agents authorised by or profitable to them, and allowed actions to be brought directly against the employer without regard to the procurator or agent; and this was the mode in which the *mandator* was made responsible. The prætor also gave the *mandator* the right to sue directly without the consent of the agent (D. iii. 3. 68); a right not given by the *actiones institoriæ* and *exercitoriæ* except in special cases. Thus, ultimately, obligations were acquired by or against the *mandator* through the agent, and not for him by the agent.

1. Mandantis tantum gratia intervenit mandatum, veluti si quis tibi mandet, ut negotia ejus gereres, vel ut fundum ei emeres, vel ut pro eo sponderes.	1. A mandate is made for the benefit of the mandator only; if, for instance, any one gives you a mandate to transact his business, to buy an estate for him, or to become surety for him.

D. xvii. 1. 2. 1.

This is the usual case of a *mandatum*. Justinian employs here, it may be remarked, the word *sponderes*, although *sponsores* no longer existed. (See Tit. 20.)

2. Tua et mandantis, veluti si mandet tibi, ut pecuniam sub usuris crederes ei, qui in rem ipsius mutuaretur, aut si, volente te agere cum eo ex fidejussoria causa, mandet tibi, ut cum reo agas periculo mandantis, vel ut ipsius periculo stipuleris ab eo, quem tibi deleget in id, quod tibi debuerat.

2. A mandate is made for your benefit and that of the mandator; if, for instance, he gives a mandate to you to lend money at interest to a person who borrows it for the purposes of the mandator: or if, when you are about to sue him as a *fidejussor*, he gives you a mandate to sue the principal at his risk, or to stipulate at his risk for payment of something owed by him to you, with a person whom he appoints as his substitute.

D. xvii. 1. 2. 4; D. xvii. 1. 45. 7, 8.

Volente te agere cum eo ex fidejussoria causa. Under the law anterior to Justinian, the creditor could sue either the debtor or the *fidejussor*, but not both. If he elected to sue the latter, the *fidejussor* might give him a *mandatum* to sue the debtor, and then, if the creditor did so, the *fidejussor* would be freed from any obligation as *fidejussor*, but would be bound as *mandator*; and thus the mandate would be for the benefit of the *fidejussor*, because he would be sued after the principal, and for the benefit of the creditor, because he could sue the principal first and then the surety in his quality of *mandator*, whereas he could not ordinarily sue both the principal and the surety, but was obliged to make his choice between them, as the *litis contestatio* in the action he first brought extinguished the obligation they had jointly made. This could not be of any use after Justinian had decided that the principal debtor should be sued first, and then, if there was any deficiency, the *fidejussor*. (See Tit. 20. 4.)

Ab eo quem tibi deleget. The debtor points out to the creditor a third person who owes the debtor a sum equal to his debt to the creditor, and asks the creditor to stipulate with this third person for payment of the amount due from the debtor. If the third person does not pay, the debtor is held responsible as *mandator*. The creditor thus benefits, as he has two persons to sue, and the debtor benefits, because he employs his creditor to collect a debt due to him.

3. Aliena tantum causa intervenit mandatum, veluti si tibi mandet, ut Titii negotia gereres, vel ut Titio fundum emeres, vel ut pro Titio sponderes.

3. A mandate is made for the benefit of a third person, if, for example, the mandator bids you manage the affairs of Titius, or buy an estate for Titius, or become surety for Titius.

D. xvii. 1. 2. 2.

4. Sua et aliena, veluti si de communibus suis et Titii negotiis gerendis tibi mandet, vel ut sibi et

4. A mandate is made for the benefit of the mandator and of a third person, if, for example, the mandator

Titio fundum emeres, vel ut pro eo et Titio sponderes.

gives you a mandate to manage affairs common to himself and Titius, or to buy an estate for himself and Titius, or to become surety for himself and Titius.

D. xvii. 1. 2. 3.

5. Tua et aliena, veluti si tibi mandet, ut Titio sub usuris crederes. Quodsi ut sine usuris crederes, aliena tantum gratia intercedit mandatum.

5. A mandate is made for your benefit and for that of a third person, if, for instance, the mandator bids you to lend money at interest to Titius. Were the money to be lent without interest, the mandate would be only for the benefit of a third person.

D. xvii. 1. 2. 5.

6. Tua tantum gratia intervenit mandatum, veluti si tibi mandet, ut pecunias tuas potius in emptiones prædiorum colloces, quam feneres, vel ex diverso ut feneres potius, quam in emptiones prædiorum colloces. Cujus generis mandatum magis consilium est quam mandatum et ob id non est obligatorium, quia nemo ex consilio mandati obligatur, etiamsi non expediat ei, cui dabitur, cum liberum cuique sit apud se explorare, an expediat consilium. Itaque si otiosam pecuniam domi te habentem hortatus fuerit aliquis, ut rem aliquam emeres vel eam crederes, quamvis non expedierit tibi eam emisse vel credidisse, non tamen tibi mandati tenetur. Et adeo hæc ita sunt, ut quæsitum sit, an mandati teneatur, qui mandavit tibi, ut Titio pecuniam fenerares: sed obtinuit Sabini sententia, obligatorium esse in hoc casu mandatum, quia non aliter Titio credidisses, quam si tibi mandatum esset.

6. A mandate is made for your benefit only, if, for example, the mandator bids you invest your money in the purchase of land rather than put it out to interest, or conversely. Such a mandate is rather a piece of advice than a mandate, and consequently is not obligatory, as no one is bound by giving advice, although it be not judicious, as each may judge for himself what the worth of the advice is. If, therefore, you have a sum of money lying idle in your house, and any one advises you to make a purchase with it, or put it out to interest, although it may not be advantageous to you to have made this purchase, or to have lent your money, yet your adviser is not bound by an action *mandati*. So much so, that it has been questioned whether a person is bound by this action who has given you a mandate to lend your money at interest to Titius. But the opinion of Sabinus has prevailed, that such a mandate is obligatory, as you would not have lent your money to Titius unless the mandate had been given to you.

GAI. iii. 156; D. xvii. 1. 2. 6.

It was a very narrow line which divided the expression of a mere opinion advising another person to do a thing, and such a request to him to do it as involved the responsibilities of a *mandatum*. Everything depended on the intention of the parties. The question was, did the person who expressed the opinion, or made the request, mean to say that, if the opinion would not be adopted, or the request granted, unless he made himself responsible for the consequences, he was willing to become responsible? If he did mean this, he was treated as a *mandator*.

A *mandator* stood in this and similar cases almost exactly in the place of a *fidejussor*. *Neque enim multum referre præsens quis interrogatus fidejubeat, an absens mandet.* (D. xvii. 1.

32.) Accordingly, in the Digest and the Code, the two are treated of under the same head, *de fidejussoribus et mandatoribus.* For the mandate might be an *intercessio,* i.e. a mode in which a third party steps in between two others as a surety for one of them, and was subject to the general rules common to accessory contracts, such as the prohibition of the *senatusconsultum Velleianum* with respect to women, the *beneficium discussionis* under Justinian, i.e. that the principal should be sued first, the *beneficium divisionis* under Hadrian's rescript, i.e. that the liabilities of co-sureties should be divided, and, to some extent, the *beneficium cedendarum actionum.* (See Tit. 20. 4.)

But the *mandatum,* being a distinct and not an accessory contract, was, in some points, distinguished from a *fidejussio.* 1. The *mandator* was sometimes considered more responsible than the *fidejussor.* If a minor borrowed money under a guarantee, and was *restitutus in integrum,* Ulpian says it was doubtful whether the loss should fall on the creditor or the *fidejussor;* but he is clear it ought to fall on the *mandator* if the guarantee was given by mandate, not by *fidejussio.* (D. iv. 4. 13. pr.) 2. The debtor and the *fidejussor* being liable for the same debt, the *litis contestatio* in a suit against the debtor released the *fidejussor;* but this was not so in the case of the *mandator,* who was bound by a separate contract. Justinian altered the law, and made the action against the *fidejussor* survive, thus, as he says, placing him in the position of the *mandator.* (C. viii. 41. 28.) 3. If once there was a *litis contestatio* in a suit against the *fidejussor,* it was no longer open to the *fidejussor* to demand that the actions against the debtor and the other *fidejussores* should be ceded to him, for the *litis contestatio* had extinguished them ; but neither the *litis contestatio* nor judgment against the debtor affected the claim of the *mandator* for the cession of actions. (D. xlvi. 3. 95. 10.) 4. The *fidejussor* could only claim that the actions which the creditor actually had should be ceded to him ; but the *mandator* was altogether released if the creditor had abandoned the right of bringing any action he could have brought, because, the contracts being distinct and the creditor bound by a bilateral contract to the *mandator,* if he had not fulfilled his duty, the *mandator* was free from his obligation. (D. xlvi. 3. 95. 11.)

7. Illud quoque mandatum non est obligatorium, quod contra bonos mores est, veluti si Titius de furto aut damno faciendo aut de injuria facienda tibi mandet. Licet enim pœnam istius facti nomine præstiteris, non tamen ullam habes adversus Titium actionem.

7. A mandate, again, is not obligatory which is contrary to *boni mores;* as, for instance, if Titius gives you a mandate to commit a theft, or do a harm or injury ; for although you pay the penalty of what you may do, you have not in such a case an action against Titius.

GAI. iii. 157 ; D. xvii. 1. 22. 6.

8. Is, qui exsequitur mandatum, non debet excedere fines mandati. Ut ecce si quis usque ad centum

8. A mandatary must not exceed the limits of the mandate ; for instance, if a mandator bids you buy land or

aureos mandaverit tibi, ut fundum emeres vel ut pro Titio sponderes, neque pluris emere debes neque in ampliorem pecuniam fidejubere; alioquin non habebis cum eo mandati actionem: adeo quidem, ut Sabino et Cassio placuerit, etiam si usque ad centum aureos cum eo agere velis, inutiliter te acturum. Diversæ scholæ auctores recte te usque ad centum aureos acturum existimant: quæ sententia sane benignior est. Quod si minoris emeris, habebis scilicet cum eo actionem, quoniam qui mandat, ut sibi centum aureorum fundus emeretur, is utique mandasse intellegitur, ut minoris, si possit, emeretur.

become surety for Titius up to the amount of a hundred *aurei*, you must not exceed this sum in making the purchase or becoming surety, otherwise you will not have an action *mandati;* so much so, that Sabinus and Cassius thought that even if you limited your action to a hundred *aurei*, you would bring it in vain. The authors of the opposite school think that you may rightly bring an action limited to a hundred *aurei*, and this opinion is doubtless the more gracious. If you lay out less on the purchase, you can certainly bring an action against the mandator; for a person who gives a mandate that an estate shall be bought for him at the price of a hundred *aurei*, is understood to mean that it should be bought for less if possible.

GAI. iii. 161; D. xvii. 1. 3. 2; D. xvii. 1. 4. 5.

Qui excessit, aliud quid facere videtur. (D. xvii. 1. 5.) Sabinus, in giving the opinion mentioned in the text, insisted very rigorously on the effect of the thing done being *aliud quid*.

9. Recte quoque mandatum contractum, si, dum adhuc integra res sit, revocatum fuerit, evanescit.

9. The mandate, although validly formed, is extinguished, if it is revoked before it is begun to be executed.

GAI. iii. 159.

The power of revoking the mandate, if the revocation did not harm the *mandatarius*, and if the matter was still *res integra*, gives a peculiar feature to this contract. The contract was formed, and yet it was not certain to come into operation.

10. Item si adhuc integro mandato mors alterutrius interveniat, id est vel ejus, qui mandaverit, vel ejus, qui mandatum susceperit, solvitur mandatum. Sed utilitatis causa receptum est, si mortuo eo, qui tibi mandaverit, tu ignorans, eum decessisse, exsecutus fueras mandatum, posse te agere mandati actione: alioquin justa et probabilis ignorantia damnum tibi afferat. Et huic simile est, quod placuit, si debitores manumisso dispensatore Titii per ignorantiam liberto solverint, liberari eos: cum alioquin stricta juris ratione non possent liberari, quia alii solvissent, quam cui solvere debuerint.

10. A mandate is also extinguished, if, before it is begun to be executed, the mandator or mandatary dies. But motives of convenience have given rise to the decision, that if, after the death of the mandator, you, in ignorance of his decease, execute the mandate, you may bring an action *mandati;* otherwise you would be prejudiced by what was allowable and natural ignorance. Similarly it has been decided that, if debtors make a payment to the steward of Titius, after he has been enfranchised, in ignorance of his enfranchisement, they are freed from their obligation, although, in strict law, they could not be freed, as they have made the payment to a person other than him to whom they ought to have made it.

GAI. iii. 160; D. xvii. 1. 26. pr.

Manumisso. It would be the same if the slave had not been enfranchised, but had been sold, or had his office of *dispensator* taken from him without the knowledge of the debtors. (D. xlvi. 3. 51.)

11. Mandatum non suscipere liberum est: susceptum autem consummandum aut quam primum renuntiandum est, ut aut per semet ipsum aut per alium eandem rem mandator exsequatur. Nam nisi ita renuntiatur, ut integra causa mandatori reservetur eandem rem explicandi, nihilo minus mandati actio locum habet, nisi si justa causa intercessit aut non renuntiandi aut intempestive renuntiandi.

11. Every one is free to refuse accepting a mandate, but if it is once accepted, it must be executed, or else renounced with all despatch so as to permit the mandator carrying out his purpose himself or through another. For, unless the renunciation is made so that the mandator is still in a position to do this, an action *mandati* may be brought in spite of the renunciation of the mandatary, unless some good reason has prevented him making the renunciation, or making it within a proper time.

D. xvii. 1. 22. 11.

Nisi si justa causa. For example, a sudden and serious illness, a deadly enmity springing up between the *mandator* and the *mandatarius*, or the insolvency of the former. (D. xvii. 1. 23-25.) In the execution of the mandate the *mandatarius* was bound to use the diligence of a *bonus paterfamilias.* (Tit. 27. 1.)

12. Mandatum et in diem differri et sub condicione fieri potest.

12. A mandate may be made to take effect from a particular time, or may be made conditionally.

D. xvii. 1. 1. 3.

13. In summa sciendum est, mandatum, nisi gratuitum sit, in aliam formam negotii cadere: nam mercede constituta, incipit locatio et conductio esse. Et ut generaliter dixerimus: quibus casibus, sine mercede suscepto officio, mandati aut depositi contrahitur negotium, his casibus, interveniente mercede, locatio et conductio contrahi intellegitur. Et ideo si fulloni polienda curandave vestimenta dederis aut sarcinatori sarcienda, nulla mercede constituta neque promissa, mandati competit actio.

13. Lastly, it may be observed, that unless a mandate is gratuitous, it will take the form of some other contract; for, if a consideration is fixed on, it is a contract of letting on hire. And generally we may say, that in every case in which, whenever, the duty being undertaken without pay, there is a contract of mandate or deposit, in every such case, if pay is received, the contract is one of letting to hire. If, therefore, a person gives his clothes to a fuller to be scoured or cleaned, or to a tailor to be mended, without any pay being agreed on or promised, an action *mandati* may be brought.

GAI. ii. 162; D. xvii. 1. 1. 4.

Although the execution of the *mandatum* was necessarily gratuitous, yet, without making the contract a *locatio conductio,* a *mandator* might offer a reward to the *mandatarius,* not exactly in payment of, but in gratitude for, his services. Such a recompense was called *honorarium,* or sometimes *salarium,* a term that was especially applied to the recompense offered to those who exercised the liberal professions, such as philosophers, rhetoricians,

physicians, advocates, &c. These *honoraria* could not be made the subject of an action; but the magistrate, prætor, or præses of the province pronounced *extra ordinem* (see Introd. sec. 108) whether they were due and what was the proper amount. (D. 1. 13. 1.)

TIT. XXVII. DE OBLIGATIONIBUS QUASI EX CONTRACTU.

Post genera contractuum enumerata dispiciamus etiam de his obligationibus, quæ non proprie quidem ex contractu nasci intelleguntur, sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur.

Having enumerated the different kinds of contracts, let us treat of those obligations which do not spring, properly speaking, from a contract, but yet, as they do not take their origin from a delict, seem to arise, as it were, from a contract.

If obligations were to be considered as always arising either *ex contractu* or *ex delicto*, one man could only be bound to another in one of two ways: either by a mutual exercise of will he had entered into an agreement with him, or he had done him some injury which he ought to repair. But there were many instances in which justice required that he should be considered bound, where no contract had been made, and where nothing to which the law gave the technical term of *delictum* had been committed. Such cases, however, if separately examined, would approach either to an *obligatio ex contractu* or to one *ex delicto*. If it more nearly resembled the former, the binding tie was called an *obligatio quasi ex contractu;* if the latter, it was called an *obligatio quasi ex delicto.* (See Introd. sec. 87, 88.)

The leading distinction between obligations *ex contractu* and those *quasi ex contractu* is, that in the former one person chooses to bind himself to another, in the latter he is placed in such circumstances that he is thereby bound to another. To take, for instance, the examples given in the Title: if I take upon me the management of my neighbour's affairs, become tutor, have things in common with others who are not my partners, accept an inheritance, or receive money not due to me, the mere fact of my so conducting myself imposes upon me certain duties which the law will force me to fulfil. Of course, if I make an express agreement in any of these cases, I am then bound by the agreement, and not by the circumstances of my position. It is only in the absence of any agreement that I am bound by an *obligatio quasi ex contractu.* An *obligatio quasi ex contractu* does not rest on any contract at all; it rests on a fact or event, but there is an analogy between a contract and the kind of fact or events which give rise to an *obligatio quasi ex contractu,* for they both create rights *in personam.* (See AUSTIN, *Jurisprudence* (ed. 1869), p. 944.) The instances of obligations *quasi ex contractu* which follow are only meant as examples, not as an exhaustive list.

1. Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quæ appellantur negotiorum gestorum: sed domino quidem rei gestæ adversus eum, qui gessit, directa competit actio, negotiorum autem gestori contraria. Quas ex nullo contractu proprie nasci manifestum est: quippe ita nascuntur istæ actiones, si sine mandato quisque alienis negotiis gerendis se obtulerit: ex qua causa ii, quorum negotia gesta fuerint, etiam ignorantes obligantur. Idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia: quæ sane nemo curaturus esset, si de eo, quod quis impendisset, nullam habiturus esset actionem. Sicut autem is, qui utiliter gesserit negotia, habet obligatum dominum negotiorum, ita et contra iste quoque tenetur, ut administrationis rationem reddat. Quo casu ad exactissimam quisque diligentiam compellitur reddere rationem: nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia.

1. Thus, if a person has managed the affairs of another in his absence, they have reciprocally actions *negotiorum gestorum*, the action belonging to the owner against him who has managed his affairs being an *actio directa*, and the action given to this person against the owner being an *actio contraria*. It is evident that these actions cannot properly be said to arise from a contract, for they arise only when one person has, without receiving a mandate, taken upon himself the management of the affairs of another, and consequently those whose affairs are thus managed are bound by an obligation, even without their knowing it. It is from motives of convenience that this has been admitted, to prevent the entire neglect of the affairs of absent persons, who may be forced to depart in haste, without having entrusted the management to any one; and certainly no one would pay any attention to their affairs, unless he could recover by action any expenses he might be put to. On the other hand, just as he who has advantageously managed the affairs of another makes this person liable to him by an obligation, so he himself is bound to render an account of his management. And the standard which he is bound to observe in rendering an account, is that of the most exact diligence, nor is it sufficient that he should use such diligence as he employs in the management of his own affairs, that is, if it is possible that a person of greater diligence would be likely to manage the affairs of the absent person better.

D. iii. 5. 2; D. xliv. 7. 5. pr.; C. ii. 18. 20.

Etiam ignorantes. If the owners had known of the part taken in the management of their affairs, there would have been a *mandatum tacitum.*

2. Tutores quoque, qui tutelæ judicio tenentur, non proprie ex contractu obligati intelleguntur (nullum enim negotium inter tutorem et pupillum contrahitur): sed quia sane non ex maleficio tenentur, quasi ex contractu teneri videntur. Et hoc autem casu mutuæ sunt actiones: non tantum enim pupillus cum tutore habet tutelæ actionem, sed et ex contrario tutor cum pupillo habet contrariam tutelæ, si vel impenderit aliquid in rem pupilli vel pro eo

2. Tutors, again, who are liable to the action *tutelæ*, are not, properly speaking, bound by a contract, for there is no contract made between the tutor and the pupil; but as they are certainly not bound by a delict, they seem to be bound *quasi ex contractu.* In this case, too, there are reciprocal actions, for not only has the pupil an action *tutelæ* against the tutor, but, in his turn, the tutor has an *actio contraria tutelæ* against the pupil, if he has incurred any expenses in managing

fuerit obligatus aut rem suam creditori ejus obligaverit.

the pupil's property, or has entered into an obligation for him, or given his own property as security to the pupil's creditors.

D. xliv. 7. 5. 1.

We should add here the corresponding case of the curator. His *negotiorum gestio* did not give rise to a special action, but to the *actio negotiorum gestorum contraria,* of which he could avail himself to reimburse himself for all reasonable expenses. (D. iii. 5. 3. 5; D. xxvii. 3. 4. 3.)

Quasi ex contractu teneri videntur. The exact translation would be 'seem to be bound by a tie analogous to that by which persons are bound under contracts'; but as this is too long a phrase to repeat every time the words *quasi ex contractu* occur, the Latin has been retained in the translation.

3. Item si inter aliquos communis sit res sine societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo judicio, quod solus fructus ex ea re perceperit, aut quod socius ejus in eam rem necessarias impensas fecerit: non intellegitur proprie ex contractu obligatus esse, quippe nihil inter se contraxerunt: sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur.

3. So, again, if a thing is common to two or more persons, without there being any partnership between them, as, for instance, if they have received a joint legacy or gift, and one of them is liable to the other by an action *communi dividundo,* because he alone has enjoyed the fruits of the thing, or because the other party has incurred expenses necessary for the thing, he cannot be properly said to be bound by a contract, for no contract has been made; but as he is not bound by a delict, he is said to be bound *quasi ex contractu.*

D. xvii. 2. 31, 34.

Necessarias impensas. Useful expenses, and not merely necessary ones, could be recovered. (D. x. 3. 11.)

4. Idem juris est de eo, qui coheredi suo familiæ erciscundæ judicio ex his causis obligatus est.

4. It is the same with regard to a person who is bound to his co-heir under similar circumstances by an action *familiæ erciscundæ.*

D. xvii. 2. 34.

The *actio familiæ erciscundæ* was that by which any one *heres* applied to the judge to make a fair division of the inheritance. (See Introd. sec. 103.)

5. Heres quoque legatorum nomine non proprie ex contractu obligatus intellegitur; neque enim cum herede neque cum defuncto ullum negotium legatarius gessisse proprie dici potest: sed quia ex maleficio non est obligatus heres, quasi ex contractu debere intellegitur.

5. The heir, too, is not, properly speaking, bound in regard to legacies by a contract, for the legatee cannot be properly said to have made a contract with the heir or with the deceased; but, as the heir is not bound by a delict, he is considered to be bound *quasi ex contractu.*

D. xliv. 7. 5. 2.

The circumstance of accepting the inheritance imposed on the

heir the obligation of carrying out the testator's wishes, and this he was compelled to do by the *actio ex testamento*. If a particular thing was given as a legacy, so that the legatee could bring a *vindicatio*, he might exercise his choice between the personal and the real action.

6. Item is, cui quis per errorem non debitum solvit, quasi ex contractu debere videtur. Adeo enim non intellegitur proprie ex contractu obligatus, ut, si certiorem rationem sequamur, magis, ut supra diximus, ex distractu quam ex contractu possit dici obligatus esse: nam qui solvendi animo pecuniam dat, in hoc dare videtur, ut distrahat potius negotium quam contrahat. Sed tamen proinde is, qui accepit, obligatur, ac si mutuum illi daretur, et ideo condictione tenetur.

6. A person to whom money not due has been paid by mistake, is bound *quasi ex contractu*. For so far is he from being bound by a contract, that, to reason strictly, we may say, as we have said before, that he is bound rather by the dissolution than by the formation of a contract for a payment is generally made to dissolve, not to form, a contract and yet he who receives it in the case we have mentioned is bound exactly as if it had been given him as a *mutuum*, and is therefore liable to a *condictio*.

D. xliv. 7. 5. 3.

If a person knowingly made a payment not due, he could not recover what he paid, as the payment was treated as a gift (D. l. 17. 53); nor could he, if he paid what was due by a natural, though not by a legal, obligation, or if he paid sooner than he need have done what he must pay at a certain date; but he could recover if he paid, under a conditional undertaking, before the event had happened. (D. xii. 6. 64.) Whether the error which would permit him to recover might be one arising from ignorance not only of fact but of law, is uncertain. We find on the one hand such statements as *Juris ignorantia suum petentibus non nocet* (D. xxii. 6. 7), and on the other such as *Regula est juris quidem ignorantiam cuique nocere*. (D. xxii. 6. 9; C. i. 18.)

The word 'pay,' '*solvo*,' must be taken in a much more extended sense than the payment of money. It must be considered as including anything given to or done for another.

It is here said that the person who receives what is not due is bound not merely *quasi ex contractu*, but as if he had been bound by a particular contract, viz. *mutuum*. So the persons interfering in the affairs of another, the tutor and the curator, are bound as if by a mandate, and the persons mentioned in paragr. 3 and 4 as if they were bound by the particular contract of *societas*.

The remedy of the person who had paid by mistake was termed *condictio indebiti*, and if the thing paid or given over was money, or anything of which an equal quantity could be given in return, the action was precisely like the *condictio certi* protecting a *mutuum*. (See Tit. 13. 2. note 7.) But if it was not of this nature, if, for example, a freedman, bound to render some services to his patron, had by mistake rendered other services, he could recover the value of the services rendered, and this was an uncertain amount. This does not resemble the position of a person recover-

ing a *mutuum*. (D. xii. 6. 26. 12.) The non-liability of a pupil to repay what he had received without being due to him has been noticed in Tit. 14. 1.

7. Ex quibusdam tamen causis repeti non potest, quod per errorem non debitum solutum sit. Namque definiverunt veteres, ex quibus causis infitiando lis crescit, ex his causis non debitum solutum repeti non posse, veluti ex lege Aquilia, item ex legato. Quod veteres quidem in his legatis locum habere voluerunt, quæ certa constituta per damnationem cuicumque fuerunt legata: nostra autem constitutio cum unam naturam omnibus legatis et fideicommissis indulsit, hujusmodi augmentum in omnibus legatis et fideicommissis extendi voluit: sed non omnibus legatariis præbuit, sed tantummodo in his legatis et fideicommissis, quæ sacrosanctis ecclesiis ceterisque venerabilibus locis, quæ religionis vel pietatis intuitu honorificantur, derelicta sunt, quæ si indebita solvantur, non repetuntur.

7. In some cases, however, money paid by mistake cannot be recovered. The ancients have decided that this is so in cases in which the amount recovered is increased if the liability is denied; as, for instance, in actions brought under the *lex Aquilia*, or with respect to a legacy. The rule was only applied by the ancients, in the case of legacies where specific things were given *per damnationem*. But our constitution, which has placed all legacies and *fideicommissa* on the same footing, has decided that this increase should be extended to all legacies and *fideicommissa*. It has not, however, given it in behalf of all legatees, but only in the case of legacies and *fideicommissa* left to holy churches and other venerable places held in honour from feelings of religion or piety; such legacies, although paid when not due, cannot be recovered.

Gai. ii. 283, and iv. 9, 171; C. iv. 5. 4; C. i. 2. 23.

This penalty, first exacted from those who denied that a judgment pronounced against them had been pronounced, was extended to cases of refusing to pay legacies given *per damnationem*, to cases under the *lex Aquilia* (Bk. iv. Tit. 3), and to many other cases. (Bk. iv. Tit. 6. 19, 23.)

In all cases where by denying his liability the person liable might have an increased amount ultimately recovered against him, it was considered that paying the thing for which he was, or for which he thought himself, liable, was but a mode of escaping from paying a penalty, and that it was paid in order to attain security. If, therefore, it was discovered that the thing need not have been paid, yet, as the person who paid it had paid it to purchase security, he could not recover it back.

Nostra constitutio. This constitution is not to be found in the Code, but we have provisions in the Code bearing on the subject. (See C. vi. 43. 2. 1-3.)

Ceteris venerabilibus locis. Such, for instance, as monasteries, asylums for strangers, orphans, the aged, &c. (C. i. 2. 23.)

TIT. XXVIII. PER QUAS PERSONAS NOBIS OBLIGATIO ADQUIRITUR.

Expositis generibus obligationum, quæ ex contractu vel quasi ex contractu nascuntur, admonendi sumus, adquiri vobis non solum per vosmet ipsos, sed etiam per eas quoque personas, quæ in vestra potestate sunt, veluti per servos vestros et filios: ut tamen, quod per servos quidem vobis adquiritur, totum vestrum fiat, quod autem per liberos, quos in potestate habetis, ex obligatione fuerit adquisitum, hoc dividatur secundum imaginem rerum proprietatis et ususfructus, quam nostra discrevit constitutio: ut, quod ab actione commodum perveniat, hujus usumfructum quidem habeat pater, proprietas autem filio servetur, scilicet patre actionem movente secundum novellæ nostræ constitutionis divisionem.

After having gone through the different kinds of obligations which arise from a contract, or arise *quasi ex contractu*, we may observe that you may acquire an obligation, not only by yourselves, but also by those who are in your power, as your slaves or children. But there is this distinction in acquiring by slaves or by children, that what is acquired for you by your slaves is entirely yours, while that which has been acquired by an obligation through children in your power is divided as to the ownership and usufruct according to the scheme as to the ownership and usufruct of things laid down in our constitution. Thus, of all that is gained by an action, the father will have the usufruct, and the ownership will be reserved for the son, that is to say, when the action is brought by the father in conformity with what is laid down by our new constitution.

GAI. iii. 163; C. vi. 61. 8. 3.

By acquiring an obligation is meant that we become creditors, and have a right to the action necessary to enforce the obligation.

As to the division of the usufruct and ownership, see Bk. ii. Tit. 9. 1. It is the object of the obligation, it may be observed, not the obligation itself, that is thus divided between the father and the son. Only the father could bring the action to enforce the obligation (*patre actionem movente*). (C. vi. 61. 8. 3.)

1. Item per liberos homines et alienos servos, quos bona fide possidetis, adquiritur vobis, sed tantum ex duabus causis, id est si quid ex operis suis vel ex re vestra adquirant.

1. Again, acquisition is made for you by freemen, and by slaves belonging to others, whom you possess *bona fide*, but only in two cases, namely, when it arises from their labours, or from something belonging to you.

GAI. iii. 164.

See Bk. ii. Tit. 9. 4.

Per liberos homines, i.e. by persons really free, but whom we *bona fide* believe to be slaves.

2. Per eum quoque servum in quo usumfructum vel usum habetis, similiter ex duabus istis causis vobis adquiritur.

2. Acquisition is equally made for you in the same two cases by a slave of whom you have the usufruct or use.

GAI. iii. 165; D. vii. 8. 14. pr.

See Bk. ii. Tit. 9. 4.

In the case of a slave of whom we have only the use, we can only acquire when the two cases unite, i.e. when his labour is expended on something that is our property, for we cannot derive any benefit from his labour expended elsewhere.

3. Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut per traditionem accipiendo illi soli adquirit, veluti cum ita stipuletur: 'Titio domino meo dare spondes?' sed si unius domini jussu servus fuerit stipulatus, licet antea dubitabatur, tamen post nostram decisionem res expedita est, ut illi tantum adquirat, qui hoc ei facere jussit, ut supra dictum est.

3. A slave held in common undoubtedly acquires for his different owners in proportion to their interests in him, excepting that, in stipulating or receiving by tradition for one only, whom he mentions by name, he acquires only for this one; for instance, if he stipulates thus, 'Do you engage to give to Titius my master?' But if the slave has stipulated by order of one master only, in spite of former doubts, there is no question since our constitution, but that he acquires, as we have already said, for him alone who has given him the order.

Gai. iii. 167; C. iv. 27. 2.

The text only notices the acquisition of obligations through others as recognised by the civil law, i.e. through slaves and sons *in potestate*, and does not notice the prætorian changes by which the principal acquired obligations through his agent. (See Tit. 26. pr.)

Tit. XXIX. QUIBUS MODIS OBLIGATIO TOLLITUR.

Tollitur autem omnis obligatio solutione ejus, quod debetur, vel si quis, consentiente creditore, aliud pro alio solverit. Nec tamen interest, quis solvat, utrum ipse, qui debet, an alius pro eo: liberatur enim et alio solvente, sive sciente debitore sive ignorante vel invito solutio fiat. Item si reus solverit, etiam ii, qui pro eo intervenerunt, liberantur. Idem ex contrario contingit, si fidejussor solverit: non enim solus ipse liberatur, sed etiam reus.

Every obligation is dissolved by the payment of the thing due, or of something else given in its place with the consent of the creditor. And it makes no difference whether it is the debtor himself who pays, or some one else for him; for the debtor is freed from the obligation, if payment is made by a third person, and that either with or without the knowledge of the debtor, or even against his will. If the debtor pays, all those who have become surety for him are thereby freed, just as, on the other hand, if a surety pays, not only he himself is freed, but the principal is freed also.

Gai. iii. 168; D. xlvi. 3. 53, 38. 2, and 43; D. xlvi. 1. 66.

We now pass to considering how an obligation once formed may be dissolved. *Solvere*, to unloose, dissolve the tie, is the appropriate term for the process, in whatever way it may be accomplished—*Solutionis verbum pertinet ad omnem liberationem quoquo modo factam* (D. xlvi. 3. 54)—although most generally

applied to the payment of money, as the mode by which contracts are usually terminated. It is by a slight extension of the strict use of the word that a person was said not *solvere obligationem*, but *solvere pecuniam.*

The civil law, which imposed forms on the formation of a contract, imposed corresponding forms on its dissolution. And when these were fulfilled, the debtor was said to be freed from his obligation '*ipso jure*'. In later times, in cases where these forms had not been gone through, but yet equity demanded that the debtor should be considered free, the prætor allowed him to repel, by an exception, the creditor who sued him; and it has thence been said, '*obligatio aut ipso jure aut per exceptionem tollitur*'.

When it is said in the text that if the *fidejussor* pays the principal is freed, the case must be understood to be referred to of a *fidejussor* paying, without using his right of having the actions ceded to him. Payment might be made to the creditor or his authorised agent, to the tutor or curator, or to the pupil if authorised.

Of course, in every stage of the law, payment put an end to the contract. The claims of the contracting parties were satisfied, and nothing more remained to be done. But, supposing payment was not made, but one of the parties was willing to release the other, or one party could claim, for some reason, to be released, certain solemn forms had been entered into, which could not be made of no effect by the mere consent of the parties. Such forms were too solemn in the eyes of the law to lose their power unless other forms equally solemn were gone through. Accordingly, in such cases, where no real payment was made, there was what Gaius calls an *imaginaria solutio* (iii. 169), varying in the method in which it was made according to the forms *nexum, verbis,* or *litteris,* with which the contract had been formed.

If, for instance, the contract had been formed *per æs et libram,* not less than five witnesses and a *libripens* were called together. The debtor struck the scale with a piece of money and gave it to the creditor in the name of the whole sum owing. (GAI. iii. 174.) This form was also adopted in cases where payment of a legacy given *per damnationem* was remitted, probably because the testament was itself supposed to be made *per æs et libram,* and also in cases where payment of money due by a judicial sentence was remitted, probably because the most formal mode of imaginary payment was adopted when the debt had been contracted in a way which the law considered as specially solemn. (GAI. iii. 175.) This form of imaginary payment was also applicable wherever anything certain of those things which '*pondere, numero* (and probably also *mensura*) *constant*' was due.

If the contract had been made '*verbis,*' the debtor asked the creditor if he held what was due as received, '*Quod ego tibi promisi, habesne acceptum?*' The creditor answered that he did, '*Habeo*'. The creditor was said '*acceptum ferre,*' and the process

was called '*acceptilatio*'. (See next paragr., and GAI. iii. 169, 170.)

If the contract had been made '*litteris*,' the debtor probably entered on his *tabulæ* the expenditure (*expensilatio*) of the sum due, with the consent of the creditor, but we cannot learn anything from Gaius on the subject.

If the contract had been made '*re*,' the mere return of the thing was a sufficient sign that the contract was at an end. There was a visible act, and the whole object of the forms by which contracts were made and dissolved was to substitute visible acts for mere expressions of consent. Where the contract, as belonging to the *jus gentium*, could be made merely by consent, it could also be dissolved by consent. (See paragr. 4.)

1. Item per acceptilationem tollitur obligatio. Est autem acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur hæc verba debitorem dicere: 'Quod ego tibi promisi, habesne acceptum?' et Titius respondeat 'Habeo'; sed et Græce potest acceptum fieri, dummodo sic fiat, ut Latinis verbis solet: ἔχεις λαβὼν δηνάρια τόσα; ἔχω λαβών. Quo genere, ut diximus, tantum eæ obligationes solvuntur, quæ ex verbis consistunt, non etiam ceteræ: consentaneum enim visum est, verbis factam obligationem posse aliis verbis dissolvi. Sed id, quod ex alia causa debetur, potest in stipulationem deduci et per acceptilationem dissolvi. Sicut autem quod debetur, pro parte recte solvitur, ita in partem debiti acceptilatio fieri potest.

1. An obligation is also put an end to by acceptilation. This is an imaginary payment; for if Titius wishes to remit payment of that which is due to him by a verbal contract, he can do so by permitting the debtor to put to him the following question, 'Do you acknowledge to have received that which I promised you?' Titius then answering, 'I do'. The acknowledgment may also be made in Greek, provided it is made as it would be in Latin, ἔχεις λαβὼν δηνάρια τόσα; ἔχω λαβών. In this way verbal contracts are dissolved, but not contracts made in other ways: it seemed natural that an obligation formed by words should be able to be dissolved by words; but anything due by any other kind of contract may be made the subject of a stipulation, and the debtor be freed by acceptilation. And as part of a debt may be paid, so acceptilation may be made of a part only.

GAI. iii. 169, 170, 172; D. xlvi. 4. 8. 4; D. xlvi. 4. 9.

Properly the *acceptilatio* only operated as a release when the contract had been made *verbis*, but it was held, in all cases, to contain by implication a pact or agreement not to sue, and therefore an *exceptio* could be grounded on it to repel the creditor who had entered into it. *Si acceptilatio inutilis fuit, tacita pactione id actum videtur, ne peteretur.* (D. ii. 14. 27. 9.) The jurists, however, found a means of making the *acceptilatio* extend to every kind of contract. It was looked on as a stipulation which operated as a novation of the old contract, that is, which did away with the former contract, and substituted a new one in its place.

2. Est prodita stipulatio, quæ vulgo Aquiliana appellatur, per quam stipulationem contingit, ut omnium rerum obligatio in stipula-

2. A stipulation has been invented, commonly called the Aquilian, by which every obligation, whatever may be the thing it concerns, is put into the

tionem deducatur et ea per acceptilationem tollatur. Stipulatio enim Aquiliana novat omnes obligationes et a Gallo Aquilio ita composita est: 'Quidquid te mihi ex quacumque causa dare facere oportet, oportebit oporteretve, præsens in diemve, quarumque rerum mihi tecum actio, quæque abs te petitio vel adversus te persecutio est, erit, quodque tu meum habes, tenes, possides, possideresve dolove malo fecisti, quo minus possideres, quanti quæque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spopondit Numerius Negidius'. Item e diverso Numerius Negidius interrogavit Aulum Agerium: 'Quidquid tibi hodierno die per Aquilianam stipulationem spopondi, id omne habesne acceptum?' Respondit Aulus Agerius: 'Habeo acceptum' vel et 'acceptum tuli'.

form of a stipulation, and afterwards dissolved by acceptilation. This Aquilian stipulation effects a novation of all obligations, and was framed in the following terms by Gallus Aquilius:—'Whatever for any cause you are or shall be or might be bound to give or do for me, either now or at a future day; everything for which I have or shall have an *actio* with you, a *petitio* from you, or a *persecutio* against you; everything of mine which you have, hold, or possess, or might possess, or which you have made yourself not to possess through some wilful fault of your own, whatever shall be the value of each of these things, so much Aulus Agerius stipulated should be given him in money, and Numerius Negidius engaged to give it;' on the other hand, Numerius Negidius put to Aulus Agerius the question, 'All that I have promised you to-day by the Aquilian stipulation, do you acknowledge it as received?' and Aulus Agerius answered, 'I acknowledge it as received,' or 'I have entered it as received'.

D. ii. 15. 4; D. xlvi. 4. 18. 1.

This Aquilius Gallus was the friend of Cicero, whose colleague he was in the prætorship (B.C. 65). He was the pupil of Mucius, and the teacher of Sulpicius, and is mentioned in the Digest (i. 2. 2. 42) as of great authority with the people. He is said to have devised a means by which *postumi sui* might be instituted (D. xxviii. 2. 29. pr.; see Bk. ii. Tit. 13. 1 note); and Cicero informs us that he was also the author of certain formulæ in the actions of theft. (*De Off.* iii. 14.)

We may remark with what care and forethought Aquilius Gallus has made his formula applicable to all possible cases. '*Causa*' is the generical expression. '*Oportet, oportebit oporteretve*' embrace the present, the future, and the conditional. '*Præsens in diemve*' (some texts add '*aut sub conditione*') refer to what are termed the 'modalities' to which contracts are liable. '*Actio*' is the '*actio in personam*'; '*petitio*' is the '*actio in rem*'; '*persecutio*' is the extraordinary proceeding before a magistrate; '*habes*' refers to '*dominium*'; '*tenes*' to physical detention; '*possides*' to possession. The expression, '*dolove malo fecisti, quo minus possideres*,' was added to express the obligation which bound a person who had fraudulently destroyed a thing in his possession to prevent the owner reclaiming it. The *stipulatio Aquiliana* was equally applicable if the object was to effect a novation intended to operate as the foundation of a new contract to be really fulfilled by both the parties. (D. ii. 15. 2. and 9. 2.)

Stipulatus est, spopondit; this is the language of the *cautio*, or written record of the stipulation and the *acceptilatio*.

3. Præterea novatione tollitur obligatio. Veluti si id, quod tu Seio debeas, a Titio dari stipulatus sit. Nam interventu novæ personæ nova nascitur obligatio et prima tollitur translata in posteriorem, adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis jure tollatur: veluti si id, quod Titio tu debebas, a pupillo sine tutoris auctoritate stipulatus fuerit, quo casu res amittitur: nam et prior debitor liberatur et posterior obligatio nulla est. Non idem juris est, si servo quis stipulatus fuerit: nam tunc prior proinde obligatus manet, ac si postea nullus stipulatus fuisset. Sed si eadem persona sit, a qua postea stipuleris, ita demum novatio fit, si quid in posteriore stipulatione novi sit, forte si condicio aut dies aut fidejussor adjiciatur aut detrahatur. Quod autem diximus, si condicio adjiciatur, novationem fieri, sic intellegi oportet, ut ita dicamus factam novationem, si condicio extiterit: alioquin si defecerit, durat prior obligatio. Sed cum hoc quidem inter veteres constabat, tunc fieri novationem, cum novandi animo in secundam obligationem itum fuerat: per hoc autem dubium erat, quando novandi animo videretur hoc fieri, et quasdam de hoc præsumptiones alii in aliis casibus introducebant: ideo nostra processit constitutio, quæ apertissime definivit, tunc solum fieri novationem, quotiens hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; alioquin manere et pristinam obligationem et secundam ei accedere, ut maneat ex utraque causa obligatio secundum nostræ constitutionis definitiones, quas licet ex ipsius lectione apertius cognoscere.

3. An obligation is also dissolved by novation, as, for instance, if Seius stipulates with Titius for that which is due to Seius from you. For by the intervention of a new debtor a new obligation arises, and the former obligation is extinguished by being transferred into the latter; so much so, that it may happen, that although the latter stipulation is void, yet the former, by the effect of the novation, ceases to exist; as, for instance, if Titius stipulates with a pupil not authorised by his tutor for a debt due to Titius from you, in this case Titius loses his whole claim, for the first debtor is freed, and the second obligation is void. But the case is different if it is a slave with whom he stipulates, for then the original debtor remains bound as if no one had made a subsequent stipulation. But if it is the original debtor himself with whom you make the second stipulation there will be no novation, unless the subsequent stipulation contains something new, as, for instance, the addition or suppression of a condition, a term, or a surety. In saying that if a condition is added there is a novation, we must be understood to mean that the novation will take place if the condition is accomplished, but that if it is not accomplished, the former obligation remains binding. The ancients were of opinion that the novation only took place when the second obligation was entered into for the purpose of making the novation, and doubts consequently arose as to when this intention was to be supposed to exist, and different presumptions were laid down by those who treated the subject according to the different cases they had to settle. In consequence, our constitution was published, in which it was clearly decided that novation shall only take place when the contracting parties have expressly declared that their object in making the new contract is to extinguish the old one: otherwise the former obligation will remain binding, while the second is added to it, so that each contract will give rise to an obligation still in force, according to the provisions of our constitution, which may be more fully learned by reading the constitution itself.

GAI. iii. 176, 177, 179; D. xlvi. 2. 6, 8. 1, *et seq.*; C. viii. 41. 8.

Novation is the dissolution of one obligation by the formation of another. Ulpian says: '*Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio: hoc est, cum ex præcedenti causa ita nova constituatur, ut prior perimatur. Novatio enim a novo nomen accepit, et a nova obligatione.*' (D. xlvi. 2. 1. pr.)

Every kind of contract could be superseded by novation, but the new contract must be either *litteris* (see Tit. 21) or by stipulation, and the predominance of the use of stipulations as the instruments of novation was so great that the jurists generally refer to it alone. *Qualiscumque obligatio sit quæ præcessit, novari verbis potest.* (D. xlvi. 2. 1. 1.)

It was necessary that the obligation superseded should be existing at the time; but whether it was civil, prætorian, or natural was immaterial. (D. xlvi. 2. 1. 1.) And it was also necessary that the stipulation which superseded it should be binding, either civilly or naturally. In the text we have two instances of contracts which are not binding civilly, owing to the incapacity of the parties, one made with a pupil, and one with a slave, and a distinction is drawn between them. The stipulation made with the pupil is a stipulation, though only one binding naturally: the pupil is a Roman citizen, and can pronounce the word *spondeo;* but a stipulation made with a slave, except when the slave speaks merely as the mouthpiece of his master, is no stipulation at all. The slave cannot use the words of the formulary. There is no contract *verbis* to supersede the existing obligation.

By a novation a new debtor might be substituted, even without the consent of the original debtor. If it was done with the consent of the original debtor, the new debtor was termed *delegatus,* and the process *delegatio.* If it was done without his consent, the new debtor was termed the *expromissor,* and the process *expromissio;* but these terms, *expromissor* and *expromissio,* were also used in a wider sense, as implying the new debtor and the mode of contracting generally, without implying that the consent of the old debtor had not been given to the substitution. (D. xiii. 7. 10.)

Of course, if both parties to the original contract were willing, a new creditor could be substituted as well as a new debtor, by a novation; and if a new debtor was delegated who already owed a debt to the old debtor, there would necessarily be a change of creditor as well as debtor. A owes to B, and B to C an equal sum. If B tells A to pay C, C has a new debtor, and A a new creditor.

In the passage of Gaius (iii. 177) on which the text is based, it is said that if a sponsor was added, there was a new contract. *Sponsores* being obsolete, Justinian substitutes *fidejussor;* but although a contract might be extinguished by a surety being added, this would not be so if the parties did not mean it to have this effect.

If the original contract was made in any other way than by a stipulation, it could be superseded by a stipulation containing the

same terms. But if it was made by a stipulation, then, unless some alteration was made in it, the new stipulation would be, in fact, the old one, and there could be no *novatio*, unless some new term was added. But suppose a new stipulation was made with a condition introduced into it, was the old stipulation extinguished at once by novation? The text lays down the general principle that it was not extinguished, as it is said in the Digest (xlvi. 2. 14) *non statim fit novatio, sed tunc demum cum conditio extiterit;* the old contract endured until the condition was accomplished, and if the condition failed the old contract remained binding. But some of the jurists said that to extinguish the first contract might be the intention of the parties in making the second contract, or it might not. The question of novation was therefore a question of the intention of the parties in each particular case. Justinian lays down in the text that, unless the parties expressly declare it to be their wish that the first contract shall be extinguished by the second, the first contract shall be considered as subsisting.

In personal actions something like novation took place at two points of the suit (GAI. iii. 180)—at the *litis contestatio* (see Introd. sec. 105), and when judgment had been given. After the *litis contestatio*, the plaintiff could sue in a fresh action on what was, at this period of the suit, ascertained to be his legal position, but not on the contract itself. After judgment was given, he could sue on the judgment. But in both cases all the beneficial accessories of the original contract were continued on to the new—such, for instance, as pledges given in security remained, and interest continued to run on, *lite contestata usuræ currunt* (D. xxii. 1. 35), and so this juridical novation did not, like novation proper, quite supersede the original contract. (D. xlvi. 2. 29.)

4. Hoc amplius eæ obligationes, quæ consensu contrahuntur, contraria voluntate dissolvuntur. Nam si Titius et Seius inter se consenserunt, ut fundum Tusculanum emptum Seius haberet centum aureorum, deinde re nondum secuta, id est neque pretio soluto neque fundo tradito, placuerit inter eos, ut discederetur ab emptione et venditione, invicem liberantur. Idem est et in conductione et locatione et omnibus contractibus, qui ex consensu descendunt, sicut jam dictum est.

4. Moreover, those obligations which are formed by consent alone, are dissolved by the expression of a contrary wish. If Titius and Seius have agreed that Seius shall purchase an estate at Tusculum for a hundred *aurei*, and then, before the contract has been executed, that is, before the price has been paid, or delivery made of the estate, they agree to abandon the agreement for the sale, they are mutually freed from their obligation. It is the same in the contract of letting on hire, and, as we have just said, in all other contracts formed by consent alone.

D. xlvi. 3. 80; D. xviii. 5. 5. 1.

This paragraph must be understood with the limitation that the contract could only be rescinded *integris omnibus*, i.e. if each party could possibly be placed in the position he held before. The text rather loosely expresses this by '*re nondum secuta*'. If all things were not *integra*, but the parties agreed to make them so, this

would be a new contract extinguishing the old contract by novation, not an extinction of the contract by mere consent.

There were other modes by which a contract was dissolved, as if the subject of the contract being a thing certain perished without the fault of any party; or if the qualities of debtor and creditor were united in the same person, as, for instance, if the debtor became heir of the creditor, which is termed *confusio*; or if one debt was set off against another (*compensatio*), which, however, if the actions proper to the contract were actions *stricti juris*, would only give rise to an exception, and not to an extinction of the contract: in actions *bonæ fidei*, where equitable grounds of defence need not be stated in the formula, the *compensatio* would be necessarily taken notice of, and in such cases the contract may be said to have been virtually (see Bk. iv. Tit. 6. 39) put an end to by the *compensatio*. There were also many other things which, although they left the contract still subsisting, prevented an action being brought on it. These will be treated of in the next Book under the head of exceptions.

LIBER QUARTUS.

TIT I. DE OBLIGATIONIBUS, QUÆ EX DELICTO NASCUNTUR.

Cum expositum sit superiore libro de obligationibus ex contractu et quasi ex contractu, sequitur, ut de obligationibus ex maleficio dispiciamus. Sed illæ quidem, ut suo loco tradidimus, in quattuor genera dividuntur: hæ vero unius generis sunt, nam omnes ex re nascuntur, id est ex ipso maleficio, veluti ex furto aut rapina aut damno aut injuria.

As we have treated in the preceding Book of obligations arising *ex contractu* and *quasi ex contractu*, we have now to treat of obligations arising *ex maleficio*. Of the obligations treated of in the last Book, there are, as we have said, four kinds; of those we are now to treat of, there is but one kind, for they all arise *re*, that is, from the actual wrongdoing, as, for example, from theft, from robbery, or damage, or injury.

GAI. iii. 182; D. xliv. 7. 4.

This part of the Institutes only treats of *delicta*, i.e. violations of the rights of property, of *status*, in short of any of the rights *in rem*, such as liberty, security, and reputation, so far as they produce obligations and are the grounds of private actions. It is not the evil intent which makes an act a delict. Many acts done with evil intent are excluded from delicts, many done without evil intent are included among them. Those acts only were delicts which had been characterised and provided against as such by the ancient civil legislation, and to which a particular action was attached. (See Introd. sec. 88.) In this and the three following Titles we have the four principal kinds of delicts treated of, viz. *furtum*, *vi bona rapta*, *damni injuria*, and *injuria*.

All the obligations attached to delicts are said in the text *nasci ex re*, i.e. from the evil act or thing done, *ex ipso maleficio*, to contrast them with the various modes in which obligations *ex contractu* are formed.

Ut de obligationibus ex maleficio dispiciamus. Many texts read, *ut de obligationibus ex maleficio et quasi ex maleficio dispiciamus.*

1. Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam

1. Theft is the fraudulent dealing with a thing itself, or with its use, or

usus ejus possessionisve: quod lege naturali prohibitum est admittere.

its possession; an act which is prohibited by natural law.

D. xlvii. 2. 1. 3.

The definition of theft includes the term *contrectatio rei*, to show that evil intent is not sufficient; there must be an actual touching or seizing of the thing; *fraudulosa* to show that the thing must be seized with evil intent; and *rei*, *usus*, *possessionis*, to show the different interests in a thing that might be the subject of theft. It might seem that it would have made the definition more complete to have said *contrectatio rei alienæ.* Perhaps the word *alienæ* was left out because it was quite possible that the *dominus* or real owner of a thing should commit a theft in taking it from the possessor, as, for instance, in the case of a debtor stealing a thing given in pledge; and yet the *res* was scarcely *aliena* to the *dominus*.

Many texts, after the words *contrectatio fraudulosa*, add *lucri faciendi gratia*, i.e. with a design to profit by the act, whether the profit be that of gaining a benefit for oneself, or that of inflicting an injury on another. These words are found in the passage of the Digest (xlvii. 2. 1. 3) from which this definition of theft is taken, but the authority of the manuscripts seems against admitting them here.

Only things moveable could be the subject of theft. (See Bk. ii. Tit. 6 § 7; D. xlvii. 2. 25.) But this phrase included things moved from the soil, such as trees, fruit, crops, chalk, &c. (D. xlvii. 2. 25. 2 and 57.)

2. Furtum autem vel a furvo id est nigro dictum est, quod clam et obscure fit et plerumque nocte: vel a fraude: vel a ferendo, id est auferendo: vel a Græco sermone, qui φῶρας appellant fures. Immo etiam Græci ἀπὸ τοῦ φέρειν φωρας dixerunt.

2. The word *furtum* comes either from *furvum*, which means 'black,' because it is committed secretly and obscurely, and usually in the night; or from *fraus;* or from *ferre*, that is 'taking away'; or from the Greek word φώρ, meaning a thief, which again, the Greeks say, comes from φέρειν, to carry away.

D. xlvii. 2. 1.

3. Furtorum autem genera duo sunt, manifestum et nec manifestum. Nam conceptum et oblatum species potius actionis sunt furto cohærentes quam genera furtorum, sicut inferius apparebit. Manifestus fur est, quem Græci ἐπ' αὐτοφώρῳ appellant: nec solum is, qui in ipso furto deprehenditur, sed etiam is, qui eo loco deprehenditur, quo fit, veluti qui in domo furtum fecit et, nondum egressus januam, deprehensus fuerit, et qui in oliveto olivarum aut in vineto uvarum furtum fecit, quamdiu in eo oliveto aut in vineto fur deprehensus sit: immo ulterius furtum manifestum

3. Of theft there are two kinds, theft manifest and theft not manifest; for the thefts termed *conceptum* and *oblatum* are rather kinds of actions attaching to theft than kinds of theft, as will appear below. A manifest thief is one whom the Greeks term ἐπ αὐτοφώρῳ being not only one taken in the fact, but also one taken in the place where the theft is committed; as, for example, before he has passed on his way out through the door of the house where he has committed a theft, or in a plantation of olives or a vineyard where he has been stealing olives or grapes. We must also extend manifest theft to the case of a thief seen or

extendendum est, quamdiu eam rem fur tenens visus vel deprehensus fuerit sive in publico sive in privato vel a domino vel ab alio, antequam eo pervenerit, quo perferre ac deponere rem destinasset. Sed si pertulit, quo destinavit, tametsi deprehendatur cum re furtiva, non est manifestus fur. Nec manifestum furtum quid sit, ex his, quæ diximus, intellegitur: nam quod manifestum non est, id scilicet nec manifestum est.

seized by the owner or any one else in a public or private place, while still holding the thing he has stolen, before he has reached the place where he meant to take and deposit it. But if he once has taken it to its destination, although he is afterwards taken with the thing stolen, he is not a manifest thief. What we mean by a not manifest theft may be gathered from what we have said, for a theft which is not a manifest theft is a not manifest theft.

GAI. iii. 183-185; D. xlvii. 2. 3. and 5.

The distinction between *furtum manifestum* and *nec manifestum* is found in the law of the Twelve Tables, which affixed to a *furtum manifestum* the penalty of death if committed by a slave, and the penalty of being given over as a slave to the person injured if committed by a freeman; and attached to a *furtum nec manifestum* the penalty of double the value of the thing stolen, whether committed by a freeman or a slave. The prætor retained the penalty fixed in the latter case, but in the former altered the penalty to the payment of four times the value of the thing stolen, whether the theft was committed by a slave or a freeman. (GAI. iii. 189.)

Gaius tells us that the jurists were divided on the point of what it was that constituted a *furtum manifestum;* some thinking the thief must be taken in the act, some that he need only be taken on the spot, some that he need only be taken with the thing stolen on him before he had transported it to its destination (this is the opinion received in the text), and some that time and place were immaterial so that he was taken with the thing stolen on him. (GAI. iii. 189, 190.)

4. Conceptum furtum dicitur, cum apud aliquem testibus præsentibus furtiva res quæsita et inventa sit; nam in eum propria actio constituta est, quamvis fur non sit, quæ appellatur concepti. Oblatum furtum dicitur, cum res furtiva ab aliquo tibi oblata sit eaque apud te concepta sit, utique si ea mente tibi data fuerit, ut apud te potius quam apud eum, qui dederit, conciperetur: nam tibi, apud quem concepta sit, propria adversus eum, qui obtulit, quamvis fur non sit, constituta est actio, quæ appellatur oblati. Est etiam prohibiti furti actio adversus eum, qui furtum quærere testibus præsentibus volentem prohibuerit. Præterea pœna constituitur edicto prætoris per actionem furti non exhibiti adversus eum, qui furtivam rem apud se quæ-

4. There is what is termed *conceptum furtum*, when a thing stolen has been sought and found in the presence of witnesses in any one's house; for although this person may not be the actual thief, he is liable to a special action termed *concepti.* There is what is termed *furtum oblatum*, if a thing stolen has been placed in your house and then found there; that is, if the person who placed it in your house did so, that it might be found rather in your house than in his. For you, in whose house it has been found, would have against him who placed it in your house, although he was not the actual thief, a special action termed *oblati.* There is also the action *prohibiti furti* against a person who prevents another who wishes to seek in the presence of witnesses for a thing stolen; there is,

sitam et inventam non exhibuit. Sed hæ actiones, id est concepti et oblati et furti prohibiti nec non furti non exhibiti, in desuetudinem abierunt. Cum enim requisitio rei furtivæ hodie secundum veterem observationem non fit: merito ex consequentia etiam præfatæ actiones ab usu communi recesserunt, cum manifestissimum est, quod omnes, qui scientes rem furtivam susceperint et celaverint, furti nec manifesti obnoxii sunt.

too, by means of the action *furti non exhibiti*, a penalty provided by the edict of the prætor against a person who has not produced a thing stolen which has been searched for and found in his house. But these actions, *concepti*, *oblati*, *furti prohibiti*, and *furti non exhibiti*, have fallen into disuse; for search for things stolen is not now made according to the ancient practice, and therefore these actions have naturally ceased to be in use, as all who knowingly have received and concealed a thing stolen are liable to the action *furti nec manifesti*.

GAI. iii. 186-188.

To the *furtum conceptum* and the *furtum oblatum* a penalty of triple the value of the thing stolen was affixed by the Twelve Tables, and retained by the prætor. To the *furtum prohibitum*, not noticed in the Twelve Tables, a penalty of quadruple the value was affixed by the prætor. (GAI. iii. 192.) The Twelve Tables noticed a kind of *furtum conceptum* of which no mention is made here; it was called *furtum lance licioque conceptum*. The searcher entered the house of the supposed receiver, having nothing on his person but a cincture (*licium*) round his waist, and a plate (*lanx*) which he held with both his hands, so that there could be no suspicion that he had brought in with him the thing supposed to be stolen. If he then found the thing in the house, the receiver was punished as if he had committed a *furtum manifestum*. (GAI. iii. 192.) This mode of search and the action founded on it were suppressed by the *lex Æbutia* (about B.C. 180). (AUL. GELL. *Noct. Att.* xvi. 10.) The actions *furti concepti*, *oblati*, and *prohibiti*, were still in use in the time of Gaius.

Ulpian (D. l. 16. 13. 1) explains the meaning of the word *pœna*. *Pœna* is the punishment of an offence, *noxœ vindicta*. It is contrasted with *multa*. *Pœna* is a punishment imposed by some general law, affecting possibly the *caput* and *existimatio* of the person punished. *Multa* is a fine, imposed *ex arbitrio* by magistrates and the *prœsides provinciarum*; a money fine in later law (*pecuniaria*), a fine of cattle and sheep in earlier times (*pecuaria*).

The value of the thing was the *rei verum pretium*, its worth under all the circumstances of the case. So if a slave was stolen, who was in a position to enter on an inheritance at his master's bidding, and then died before entering, the *pretium hereditatis*, the value of the inheritance thus lost, was calculated in the value of the slave stolen. (D. xlvii. 2. 50. pr.)

5. Pœna manifesti furti quadrupli est tam ex servi persona quam ex liberi, nec manifesti dupli.

5. The penalty for manifest theft is quadruple the value of the thing stolen, whether the thief be a slave or a freeman; that for theft not manifest is double.

GAI. iii. 189, 190.

6. Furtum autem fit non solum, cum quis intercipiendi causa rem alienam amovet, sed generaliter cum quis alienam rem invito domino contrectat. Itaque sive creditor pignore sive is, apud quem res deposita est, ea re utatur sive is, qui rem utendam accepit, in alium usum eam transferat, quam cujus gratia ei data est, furtum committit. Veluti si quis argentum utendum acceperit quasi amicos ad cœnam invitaturus et id peregre secum tulerit, aut si quis equum gestandi causa commodatum sibi longius aliquo duxerit, quod veteres scripserunt de eo, qui in aciem equum perduxisset.

6. It is theft, not only when any one takes away a thing belonging to another, in order to appropriate it, but generally when any one deals with the property of another contrary to the wishes of its owner. Thus, if the creditor uses the thing pledged or the depositary the thing deposited, or a person who has received a thing to make use of it in one way employs it in another way, it is a theft; for example, if any one borrows plate on the pretence of intending to invite friends to supper, and then carries it away with him to a distance, or if any one borrows a horse, as for a ride, and takes it much farther than suits such a purpose, as if, to use a suggestion made in the writings of the ancients, he has taken it into battle.

GAI. iii. 195, 196; D. xlvii. 2. 54. pr.

7. Placuit tamen, eos, qui rebus commodatis aliter uterentur, quam utendas acceperint, ita furtum committere, si se intellegant id invito domino facere eumque, si intellexisset, non permissurum, ac si permissurum credant, extra crimen videri: optima sane distinctione, quia furtum sine affectu furandi non committitur.

7. A person, however, who borrows a thing, and applies it to a purpose other than that for which it was lent, only commits theft, if he knows that he is acting against the wishes of the owner, and that the owner, if he was informed, would not permit it; for if he really thinks the owner would permit it, he does not commit a crime; and this is a very proper distinction, for there is no theft without the intention to commit theft.

GAI iii. 197; D. xli. 3. 37. pr.

8. Sed et si credat aliquis, invito domino se rem commodatam sibi contrectare, domino autem volente id fiat, dicitur furtum non fieri. Unde illud quæsitum est, cum Titius servum Mævii sollicitaverit, ut quasdam res domino subriperet et ad eum perferret, et servus id ad Mævium pertulerit, Mævius, dum vult Titium in ipso delicto deprehendere, permisit servo quasdam res ad eum perferre, utrum furti an servi corrupti judicio teneatur Titius, an neutro? Et cum nobis super hac dubitatione suggestum est et antiquorum prudentium super hoc altercationes perspeximus, quibusdam neque furti neque servi corrupti actionem præstantibus, quibusdam furti tantummodo: nos hujusmodi calliditati obviam euntes, per nostram decisionem sanximus, non solum furti actionem, sed etiam servi corrupti contra eum dari: licet enim

8. And even if the borrower thinks he is applying the thing borrowed contrary to the wishes of the owner, yet if the owner as a matter of fact approves of the application, there is, it is said, no theft. Whence the following question arises: Titius has urged the slave of Mævius to steal from his master certain things, and to bring them to him; the slave informs his master, who, wishing to seize Titius in the act, permits the slave to take certain things to Titius: is Titius liable to an action *furti*, or to one *servi corrupti*, or to neither? This doubtful question was submitted to us, and we examined the conflicting opinions of the ancient jurists on the subject, some of whom thought Titius was liable to neither of these actions, while others thought he was only liable to the action of theft; and to prevent such subtleties, we have decided that in this case both these actions may be brought. For, although

is servus deterior a sollicitatore minime factus est et ideo non concurrant regulæ, quæ servi corrupti actionem introducerent, tamen consilium corruptoris ad perniciem probitatis servi introductum est, ut sit ei pœnalis actio imposita, tamquam re ipsa fuisset servus corruptus, ne ex hujusmodi impunitate et in alium servum, qui possit corrumpi, tale facinus a quibusdam pertentetur.

the slave has not been corrupted, and the case does not seem therefore within the rules of the action *servi corrupti*, yet the intention to corrupt the slave is indisputable, and he is therefore to be punished exactly as if the slave had been really corrupted, lest his impunity should incite others to act in the same criminal way towards a slave more easy to corrupt.

GAI. iii. 198; C. vi. 2. 20.

Was the slave corrupted? No; he had given a signal proof of his fidelity. Was the thing stolen? No; the owner had consented to its being taken. Thus had reasoned those who refused either action. Justinian avoids these subtleties, and decides that crime shall at any rate be punished, and reparation be made for a wrongful act. As to the *actio servi corrupti*, see D. xi. 3.

9. Interdum etiam liberorum hominum furtum fit, veluti si quis liberorum nostrorum, qui in potestate nostra sunt, subreptus fuerit.

9. Sometimes there may be a theft of free persons, as if one of our children in our power is carried away.

GAI. iii. 199.

Gaius adds, as an example, the case of a wife *in manu* being stolen. It was not the value of the person stolen which in such cases formed the measure of the penalty, for the value of a free person could not be calculated; but it was the loss occasioned by the theft to the person in whose power the subject of the theft was.

10. Aliquando autem etiam suæ rei quisque furtum committit, veluti si debitor rem, quam creditori pignoris causa dedit, subtraxerit.

10. A man may even commit a theft of his own property, as if a debtor takes fraudulently from a creditor a thing he has pledged to him.

GAI. iii. 200; D. xlvii. 2. 66. pr.

11. Interdum furti tenetur, qui ipse furtum non fecerit: qualis est, cujus ope et consilio furtum factum est. In quo numero est, qui tibi nummos excussit, ut alius eos raperet, aut obstitit tibi, ut alius rem tuam surriperet, vel oves aut boves tuas fugaverit, ut alius eas exciperet: et hoc veteres scripserunt de eo, qui panno rubro fugavit armentum. Sed si quid eorum per lasciviam et non data opera ut furtum admitteretur, factum est, in factum actio dari debet. At ubi ope Mævii Titius furtum fecerit, ambo furti tenentur. Ope consilio ejus quoque furtum admitti videtur, qui scalas forte fenestris supponit aut ipsas fenestras vel ostium effringit, ut alius furtum faceret, quive ferra-

11. A person may be liable to an action of theft, although he has not himself committed a theft, as, for instance, a person who has lent his aid and planned the crime. Among such is one who makes your money fall from your hand that another may seize upon it; or places himself in your way that another may carry off something belonging to you; or drives your sheep or oxen that another may make away with them, as, to take an instance given by the old lawyers, by frightening a herd with a piece of scarlet cloth. But if such acts are only the work of reckless folly, with no design of assisting in the commission of a theft, the proper action is one *in factum*. But if Mævius assists Titius to commit a robbery, both are liable to an

menta ad effringendum aut scalas, ut fenestris supponerentur, commodaverit, sciens, cujus gratia commodaverit. Certe qui nullam operam ad furtum faciendum adhibuit, sed tantum consilium dedit atque hortatus est ad furtum faciendum, non tenetur furti.

action of theft. A person, again, assists in a theft who places ladders under a window, or breaks a window or a door, that another may commit a theft; or who lends tools to break a door, or ladders to place under a window, knowing the purpose to which they are to be applied. But a person who does not actually assist, but only advises and urges the commission of a theft, is not liable to an action of theft.

GAI. iii. 202; D. xlvii. 2. 54. 4; D. xlvii. 2. 36.

12. Hi, qui in parentium vel dominorum potestate sunt, si rem eis subripiant, furtum quidem illis faciunt et res in furtivam causam cadit nec ob id ab ullo usucapi potest, antequam in domini potestatem revertatur; sed furti actio non nascitur, quia nec ex alia ulla causa potest inter eos actio nasci: si vero ope consilio alterius furtum factum fuerit, quia utique furtum committitur, convenienter ille furti tenetur, quia verum est, ope consilio ejus furtum factum esse.

12. Those who are in the power of an ascendant or master, if they steal anything belonging to the person in whose power they are, commit a theft against him. The thing stolen, in such a case, is considered to be *furtiva*, and therefore no right in it can be acquired by usucapion before it has returned into the hands of the owner; but no action of theft can be brought, because the relation of the parties is such that no action whatever can arise between them. But if the theft has been committed by the assistance and advice of another, as a theft is actually committed, this person will be subject to the action of theft, as a theft is undoubtedly committed through his aid and advice.

D. xlvii. 2. 17. pr.; D. xlvii. 2. 36. 1.

13. Furti autem actio ei competit, cujus interest, rem salvam esse, licet dominus non sit: itaque nec domino aliter competit, quam si ejus intersit, rem non perire.

13. An action of theft may be brought by any one who is interested in the safety of the thing, although he is not the owner; and the proprietor, consequently, cannot bring this action unless he is interested in the thing not perishing.

GAI. iii. 203 D. xlvii. 2. 10.

The right to bring the *actio furti* may belong to several persons at the same time. For instance, both the owner and the usufructuary had sufficient interest in the thing to support an action. But mere interest in a thing was not sufficient unless the thing had been delivered to, and was or had been in the possession of, the plaintiff. A person, for instance, to whom a thing was due by stipulation, could not bring an *actio furti* if the thing was stolen; he could only compel the actual owner to allow him to bring an *actio furti* in the owner's name; nor could an unsecured creditor bring an *actio furti* for a thing stolen from his debtor. (D. xlvii. 2. 14. 1 and 49.)

14. Unde constat, creditorem de pignore subrepto furti agere posse,

14. Hence, a creditor may bring this action if a thing pledged to him

etiamsi idoneum debitorem habeat, quia expedit ei, pignori potius incumbere quam in personam agere: adeo quidem ut, quamvis ipse debitor eam rem subripuerit, nihilo minus creditori competat actio furti.

is stolen, although his debtor is solvent, because it may be more advantageous to him to rely upon his pledge than to bring an action against his debtor personally; so much so, that although it is the debtor himself that has stolen the thing pledged, yet the creditor can bring an action of theft.

GAI. iii. 204; D. xlvii. 2. 12. 2.

15. Item si fullo polienda curandave aut sarcinator sarcienda vestimenta mercede certa acceperit eaque furto amiserit, ipse furti habet actionem, non dominus, quia domini nihil interest, eam rem non perisse, cum judicio locati a fullone aut sarcinatore rem suam persequi potest. Sed et bonæ fidei emptori, subrepta re, quam emerit, quamvis dominus non sit, omnimodo competit furti actio, quemadmodum et creditori. Fulloni vero et sarcinatori non aliter furti competere placuit, quam si solvendo sint, hoc est si domino rei æstimationem solvere possint: nam si solvendo non sunt, tunc quia ab eis suum dominus consequi non possit, ipsi domino furti actio competit, quia hoc casu ipsius interest, rem salvam esse. Idem est et si in parte solvendo sint fullo aut sarcinator.

15. So, too, if a fuller receives clothes to scour or clean, or a tailor receives them to mend, for a certain fixed sum, and has them stolen from him, it is he and not the owner who is able to bring an action of theft, for the owner is not considered as interested in their safety, having an action *locati*, by which he may recover the thing stolen, against the fuller or tailor. But if a thing is stolen from a *bona fide* purchaser, he is entitled, like a creditor, to an action of theft, although he is not the proprietor. But an action of theft is not maintainable by the fuller or tailor, unless he is solvent, that is, unless he is able to pay the owner the value of the thing lost; for if the fuller or tailor is insolvent, then the owner, as he cannot recover anything from them, is allowed to bring an action of theft, as he has in this case an interest in the safety of the thing. And it is the same although the fuller or tailor is partially solvent.

GAI. iii. 205; D. xlvii. 2. 12. pr.; D. xlvii. 2. 20. 1.

The owner has no interest in recovering the penalty if he can get compensation from the person whose services he has hired to the full amount of any loss he sustains by the theft; but he would still be able to bring an action, i.e. a *vindicatio*, an *actio ad exhibendum*, or a *condictio*, to get the thing itself, or its value, from the thief. (See paragr. 19.)

16. Quæ de fullone et sarcinatore diximus, eadem et ad eum, cui commodata res est, transferenda veteres existimabant: nam ut ille fullo mercedem accipiendo custodiam præstat, ita is quoque, qui commodum utendi percipit, similiter necesse habet custodiam præstare. Sed nostra providentia etiam hoc in decisionibus nostris emendavit, ut in domini sit voluntate, sive commodati actionem adversus eum, qui rem commodatam accepit, movere desiderat, sive furti adversus eum, qui rem subripuit, et alterutra

16. What we have said of the fuller and tailor was applied by the ancients to the borrower on gratuitous loan. For as the fuller, by accepting a sum for his labour, makes himself answerable for the safe keeping of the thing, so does a borrower by accepting the use of the thing he borrows. But our wisdom has introduced in our decisions an improvement on this point, and the owner may now bring an action *commodati* against the borrower, or of theft against the thief; but when once his choice is made, he cannot change his mind and have recourse to the

earum electa dominum non posse ex pœnitentia ad alteram venire actionem. Sed si quidem furem elegerit, illum, qui rem utendam accepit, penitus liberari. Sin autem commodator veniat adversus eum, qui rem utendam accepit, ipsi quidem nullo modo competere posse adversus furem furti actionem, eum autem, qui pro re commodata convenitur, posse adversus furem furti habere actionem, ita tamen, si dominus sciens, rem esse subreptam, adversus eum, cui res commodata fuit, pervenit: sin autem nescius et dubitans, rem non esse apud eum, commodati actionem instituit, postea autem, re comperta, voluit remittere quidem commodati actionem, ad furti autem pervenire, tunc licentia ei concedatur et adversus furem venire, nullo obstaculo ei opponendo, quoniam incertus constitutus movit adversus eum, qui rem utendam accepit, commodati actionem (nisi domino ab eo satisfactum est: tunc etenim omnimodo furem a domino quidem furti actione liberari, suppositum autem esse ei, qui pro re sibi commodata domino satisfecit), cum manifestissimum est, etiam si ab initio dominus actionem instituit commodati ignarus, rem esse subreptam, postea autem, hoc ei cognito, adversus furem transivit, omnimodo liberari eum, qui rem commodatam accepit, quemcumque causæ exitum dominus adversus furem habuerit: eadem definitione obtinente, sive in partem sive in solidum solvendo sit is, qui rem commodatam accepit.

other action. If he elects to sue the thief, the borrower is quite freed; if he elects to sue the borrower, he cannot bring an action of theft against the thief, but the borrower may, that is, provided that the owner elects to sue the borrower, knowing that the thing has been stolen. If he is ignorant or uncertain of this, and therefore sues the borrower, and then subsequently learns the true state of the case, and wishes to have recourse to an action of theft, he will be permitted to sue the thief without any difficulty being thrown in his way, for it was in ignorance of the real fact that he sued the borrower; unless, indeed, his claim has been satisfied by the borrower, for then the thief is quite free from any action of theft on the part of the owner, but the borrower takes the place of the owner in the power of bringing this action. On the other hand, it is very evident that if the owner originally brings an action *commodati*, in ignorance that the thing has been stolen, and subsequently, learning this, prefers to proceed against the thief, the borrower is thereby entirely freed, whatever may be the issue of the suit against the thief, the same rule holding good, whether the borrower is wholly or only partially solvent.

GAI. iii. 206; C. vi. 2. 22. 1. 2.

The concluding words of the paragraph mean that the owner is put to his election once for all, and if he sues the borrower, and finds the borrower cannot pay, he cannot have recourse to an *actio furti* against the thief.

17. Sed is, apud quem res deposita est, custodiam non præstat, sed tantum in eo obnoxius est, si quid ipse dolo malo fecerit: qua de causa si res ei subrepta fuerit, quia restituendæ ejus nomine depositi non tenetur nec ob id ejus interest, rem salvam esse, furti agere non potest, sed furti actio domino competit.

17. A depositary is not answerable for the safe keeping of the thing deposited, but is only answerable for wilful wrong; therefore, if the thing is stolen from him, as he is not bound by the contract of deposit to restore it, and has no interest in its safety, he cannot bring an action of theft, but it is the owner alone who can bring this action.

GAI. iii. 207; D. xlvii. 2. 14. 3.

We must, in all cases of theft, bear in mind that an *actio furti* might also be brought against any one who had '*ope consilio*' participated in the theft, and the whole amount of the penalty could be recovered separately against each thief and each person taking an indirect part in the theft. (D. xlvii. 2. 21. 9.)

Custodiam non præstat is equivalent to saying that he is not answerable for *culpa levis*.

18. In summa sciendum est, quæsitum esse, an impubes rem alienam amovendo furtum faciat. Et placet, quia furtum ex affectu consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit et ob id intellegat, se delinquere.

18. It must be finally observed, that the question has been asked whether, if a person under the age of puberty takes away the property of another, he commits a theft. The answer is, that as it is the intention that makes the theft, such a person is only bound by the obligation springing from the delict if he is near the age of puberty, and consequently understands that he is doing wrong.

GAI. iii. 208.

See Bk. iii. Tit. 19. 10 note.

19. Furti actio sive dupli sive quadrupli tantum ad pœnæ persecutionem pertinet: nam ipsius rei persecutionem extrinsecus habet dominus, quam aut vindicando aut condicendo potest auferre. Sed vindicatio quidem adversus possessorem est, sive fur ipse possidet sive alius quilibet: condictio autem adversus ipsum furem heredemve ejus, licet non possideat, competit.

19. The action of theft, whether brought to recover double or quadruple, has no other object than the recovery of the penalty. For the owner has also a means of recovering the thing itself, either by a *vindicatio* or a *condictio*. The former may be brought against the possessor, whether the thief or any one else; the latter may be brought against the thief or the heir of the thief, although not in possession of the thing stolen.

GAI. iv. 8; D. xlvii. 2. 54. 3.

The thief and those who assisted him had to pay a penalty as a punishment for their wrongdoing; but something more remained for the thief himself to do; he had to restore the thing stolen or its value. The owner could bring a *vindicatio* or an *actio ad exhibendum*, which were both *actiones arbitrariæ* (Tit. 6. 31); that is, the thief was directed to restore the thing or exhibit it, and if he did not do so, then the judge condemned him to pay what, under the circumstances, it was reasonable he should pay. These *actiones* might be brought against any possessor, against the thief, or any one who had received possession from the thief. As a general rule the person who could bring a *vindicatio* could not bring a *condictio* for the same thing; for in the *vindicatio* he asserted that the property in the thing was his, whereas in the *condictio* he asserted that the defendant ought to make over (*dare oportere*) the property in the thing to him, and these were inconsistent assertions. In the case of theft, however, the plaintiff had an option given him *odio furum* to bring what was termed a *con-*

dictio furtiva (Tit. 6. 14), and it might sometimes be advantageous to have this option. For example, the thing might have perished, and it was a rule that *res extinctæ vindicari non possunt. Extinctæ res, licet vindicari non possint, condici tamen furibus possunt.* (GAI. ii. 79.)

This *condictio furtiva* might be brought against the heirs of the thief, whereas the *actio furti*, which inflicted a punishment for a personal wrongful act, could only be brought against the thief himself. Every action against a thief or those who assisted him might be brought by the heirs of any one entitled to bring it. (See Tit. 12.)

TIT. II. VI BONORUM RAPTORUM.

Qui res alienas rapit, tenetur quidem etiam furti (quis enim magis alienam rem invito domino contrectat, quam qui vi rapit? Ideoque recte dictum est, eum improbum furem esse): sed tamen propriam actionem ejus delicti nomine prætor introduxit, quæ appellatur vi bonorum raptorum et est intra annum quadrupli, post annum simpli. Quæ actio utilis est, etiamsi quis unam rem, licet minimam, rapuerit. Quadruplum autem non totum pœna est et extra pœnam rei persecutio, sicut in actione furti manifesti diximus: sed in quadruplo inest et rei persecutio, ut pœna tripli sit, sive comprehendatur raptor in ipso delicto sive non. Ridiculum est enim, levioris esse condicionis eum, qui vi rapit, quam qui clam amovet.

A person who takes by force a thing belonging to another is liable to an action of theft, for who can better be said to take the property of another against his will than he who takes it by force? And he is therefore rightly said to be an *improbus fur*. The prætor, however, has introduced a peculiar action in the case of this delict, called *vi bonorum raptorum;* by which, if brought within a year after the robbery, quadruple the value of the thing taken may be recovered; but if brought after the expiration of a year, then the single value only can be recovered. This action may be brought even against a person who has only taken by force a single thing, even of the most trifling value. But this quadruple of the value is not altogether a penalty, the recovery of the thing being something additional, as in the action of *furtum manifestum;* for the recovery of the thing is included, so that the penalty is only of three times the value. And it is the same, whether the robber was or was not taken in the actual commission of the crime. For it would be ridiculous that a person who uses force should be treated more leniently than he who secretly removes a thing.

GAI. iv. 8.

The edict of the prætor, introducing this action, ran as follows: *Si cui dolo malo, hominibus coactis, damni quid factum esse dicetur, sive cujus bona rapta esse dicentur: in eum qui id fecisse dicetur judicium dabo.* (D. xlvii. 8. 2. pr.)

It was necessary that the act of violence should be committed with evil intent (*dolo malo*). If, for instance, a *publicanus*

carried off a flock of sheep, thinking that some offence had been committed against the *lex vectigalis*, although he was mistaken, this action could not be brought against him. (D. xlvii. 8. 2. 20.) Even if the thief was alone, or one thing, however small, was carried off, yet the action might be brought, although the words *hominibus coactis* and *bona rapta* occur in the edict. It, like the action of theft, could only be brought if the thing or things taken were moveables. (C. ix. 33. 1.)

The text explains how the amount recovered under it differed from that recovered under an *actio furti*. Under the *actio vi bonorum raptorum* the thing itself was recovered, or its value if the thief no longer had it in his possession, and also three times the estimated value of the thing itself; while the *actio furti* was only penal. (See paragr. 19 of last Title.)

The plaintiff might, if he pleased, bring the *actio furti* instead; and he might bring this action after the expiration of a year prevented his bringing that *vi bonorum raptorum*. If he first brought the latter action, he could not afterwards bring the *actio furti;* but he could first bring the *actio furti*, and afterwards bring the *actio vi bonorum raptorum* for the excess recoverable by that action. (D. xlvii. 8. 1.)

This action united in its effects the *vindicatio* or *condictio*, and also the recovery of a penalty. As it was partly penal, it could not be brought against the heirs of the thief. (D. xlvii. 8. 2. 27.) The offence of taking goods by force could also be made the subject of a criminal charge. (Tit. 18. 8.)

1. Quia tamen ita competit hæc actio, si dolo malo quisque rapuerit: qui aliquo errore inductus, suam rem esse, et imprudens juris eo animo rapuit, quasi domino liceat rem suam etiam per vim auferre possessoribus, absolvi debet. Cui scilicet conveniens est, nec furti teneri eum, qui eodem hoc animo rapuit. Sed ne, dum talia excogitentur, inveniatur via, per quam raptores impune suam exerceant avaritiam: melius divalibus constitutionibus pro hac parte prospectum est, ut nemini liceat vi rapere rem mobilem vel se moventem, licet suam eandem rem existimet: sed si quis contra statuta fecerit, rei quidem suæ dominio cadere, sin autem aliena sit, post rei restitutionem etiam æstimationem ejusdem rei præstare. Quod non solum in mobilibus rebus, quæ rapi possunt, constitutiones optinere censuerunt, sed etiam in invasionibus, quæ circa res soli fiunt, ut ex hac causa omni rapina homines abstineant.

1. As, however, this action can only be brought against a person who robs with the intent of committing a wilful wrong, if any one takes by force a thing, thinking himself, by a mistake, to be the owner, and, in ignorance of the law, believing it permitted to an owner to take away, even by force, a thing belonging to himself from persons in whose possession it is, he ought to be held discharged of this action; and on the same principles a person carrying off a thing under similar circumstances would not be liable to an action of theft. But lest robbers, under the cover of such an excuse, should find means of gratifying their avarice with impunity, the imperial constitutions have made a wise alteration, by providing that no one may carry off by force a thing that is moveable, or moves itself, although he thinks himself the owner. If any one acts contrary to these constitutions, he is, if the thing is his, to cease to be owner of it; if it is not, he is not only to restore the thing taken, but also to pay its value. The constitutions have

declared these rules applicable, not only in the case of moveables of a nature to be carried off by force, but also to forcible entries made upon things pertaining to the soil, in order that every kind of violent robbery may be prevented.

D. xlvii. 8. 2. 18; C. viii. 4. 7.

The constitution referred to was enacted in A.D. 389 by the Emperors Valentinian, Theodosius, and Arcadius. It provided a much more effectual remedy for forcible disturbance than had been given by the interdict *unde vi*. It applied, which the interdict did not, to moveables as well as immoveables, and it not only made the wrongdoer give up the thing, but it made him, if he was the owner, lose the property in the thing, and, if he was not the owner, pay its value. (See Tit. 15. 6.)

2. In hac actione non utique spectatur, rem in bonis actoris esse: nam sive in bonis sit sive non sit, si tamen ex bonis sit, locum hæc actio habebit. Quare sive commodata sive locata sive etiam pignerata sive deposita sit apud Titium sic, ut intersit ejus, eam non auferri, veluti si in re deposita culpam quoque promisit, sive bona fide possideat, sive usumfructum in ea quis habeat vel quod aliud jus, ut intersit ejus, non rapi: dicendum est, competere ei hanc actionem, ut non dominium accipiat, sed illud solum, quod ex bonis ejus, qui rapinam passus est, id est quod ex substantia ejus ablatum esse proponatur. Et generaliter dicendum est, ex quibus causis furti actio competit in re clam facta, ex iisdem causis omnes habere hanc actionem.

2. In this action it is clearly not necessary that the thing should have been part of the goods of the plaintiff; for whether it has been part of his goods or not, yet if it has been taken from among his goods, the action may be brought. Consequently, if anything has been let, lent, or given in pledge to Titius, or deposited with him, so that he has an interest in its not being taken away by force, as if, for instance, he has engaged to be answerable for any fault committed respecting it; or if he possesses it *bona fide*, or has the usufruct of it, or has any other legal interest in its not being taken away by force, this action may be brought, not to give him the ownership in the thing, but merely to restore him what he has lost by the thing being taken away by violence from out of his goods, that is, from out of his substance. And generally, we may say, that the same causes which would give rise to an action of theft, if the act is committed secretly, will give ground for this action, if it is committed with force.

D. xlvii. 8. 2. 22-24.

In order to make the punishment of an open and flagrant violation of law more severe than that of a secret theft, the very slightest interest in the thing taken was sufficient to enable a plaintiff to bring the action *vi bonorum raptorum*. For instance, a mere depositary could bring it, although his interest was not great enough to permit of his bringing an *actio furti*.

TIT. III. DE LEGE AQUILIA.

Damni injuriæ actio constituitur per legem Aquiliam. Cujus primo capite cautum est, ut si quis hominem alienum alienamve quadrupedem, quæ pecudum numero sit, injuria occiderit, quanti ea res in eo anno plurimi fuit, tantum domino dare damnetur.

The action *damni injuriæ* is established by the *lex Aquilia*, of which the first head provides, that if any one shall have wrongfully killed a slave, or a four-footed beast, being one of those reckoned among cattle, belonging to another, he shall be condemned to pay the owner the greatest value which the thing has possessed at any time within a year previously.

GAI. iii. 210; D. ix. 2. 2. pr.

The *lex Aquilia* was, as Ulpian informs us (D. ix. 2. 1.), a *plebiscitum* made on the proposition of the tribune Aquilius. It made an alteration in all the previous laws, including those of the Twelve Tables, which had treated of damage wrongfully done (*de damno injuria*). Theophilus says it was passed at the time of the secession of the plebs, meaning, probably, that to the *Janiculum*, in the year B.C. 286. (Paraphrase on paragr. 15.)

A fragment of Gaius in the Digest (D. ix. 2. 2. pr.) contains the terms of this first head of the *lex Aquilia* : '*Qui servum servamve alienum alienamve quadrupedem vel pecudem injuria occiderit, quanti id in eo anno plurimi fuit, tantum æs dare domino damnas esto*'.

1. Quod autem non præcise de quadrupede, sed de ea tantum, quæ pecudum numero est, cavetur, eo pertinet, ut neque de feris bestiis neque de canibus cautum esse intellegamus, sed de his tantum, quæ proprie pasci dicuntur, quales sunt equi, muli, asini, boves, oves, capræ. De suibus quoque idem placuit : nam et sues pecorum appellatione continentur, quia et hi gregatim pascuntur : sic denique et Homerus in Odyssea ait, sicut Ælius Marcianus in suis institutionibus refert :—

Δήεις τόν γε σύεσσι παρήμενον· αἱ δὲ νέμονται
Πὰρ Κόρακος πέτρῃ, ἐπί τε κρήνῃ Ἀρεθούσῃ.

1. As the law does not speak generally of four-footed beasts, but only of those which are reckoned among cattle, we may consider its provisions as not applying to wild animals or dogs, but only to animals which may be properly said to graze, as horses, mules, asses, sheep, oxen, goats. It has been held to apply also to swine, for they are included in the term cattle, seeing that they feed in herds. Thus Homer says, as Ælius Marcianus quotes in his Institutes :—

'You will find him seated by his swine, and they are feeding by the rock of Corax, near the spring Arethusa'.

D. ix. 2. 2. 2; D. xxxii. 65. 4.

The passage is from *Od.* xiii. 407.

2. Injuria autem occidere intellegitur, qui nullo jure occidit. Itaque qui latronem occidit, non tenetur,

2. To kill wrongfully is to kill without any right; consequently, a person who kills a robber is not liable

utique si aliter periculum effugere non potest.

to this action, that is, if he could not otherwise avoid the danger with which he was threatened.

D. ix. 2. 5. pr. and 1.

It was not necessary to consider the intent with which the damage was done. Was it done '*nullo jure*'? if so, the *lex Aquilia* applied.

3. Ac ne is quidem hac lege tenetur, qui casu occidit, si modo culpa ejus nulla invenitur: nam alioquin non minus quam ex dolo ex culpa quisque hac lege tenetur.

3. Nor is a person made liable by this law, who has killed by accident, provided there is no fault on his part, for this law punishes fault as well as wilful wrongdoing.

GAI. iii. 202, 211.

4. Itaque si quis, dum jaculis ludit vel exercitatur, transeuntem servum tuum trajecerit, distinguitur. Nam si id a milite quidem in Campo locove, ubi solitum est exercitari, admissum est, nulla culpa ejus intellegitur: si alius tale quid admisit, culpæ reus est. Idem juris est de milite, si is in alio loco, quam qui exercitandis militibus destinatus est, id admisit.

4. Consequently, if any one playing or practising with a javelin, pierces with it your slave as he goes by, there is a distinction made. If the accident is caused by a soldier, while practising in the Campus Martius, or other place appropriated to military exercises, there is no fault on his part; but any one else besides a soldier causing a similar accident is chargeable with a fault, and the soldier himself would be in fault, if he inflicted such an injury in any other place than one appropriated to military exercises.

D. ix. 2. 9. 4.

5. Item si putator ex arbore dejecto ramo servum tuum transeuntem occiderit, si prope viam publicam aut vicinalem id factum est neque præclamavit, ut casus evitari possit, culpæ reus est: si præclamavit, neque ille curavit cavere, extra culpam est putator. Æque extra culpam esse intellegitur, si seorsum a via forte vel in medio fundo cædebat, licet non præclamavit, quia eo loco nulli extraneo jus fuerat versandi.

5. If, again, any one, in pruning a tree, by letting a bough fall, kills your slave who is passing, and this takes place beside a public way or an occupation road, and he has not cried out to make persons take care, he is in fault; but if he called out, and the passer-by would not take care, he is not to blame. He is also equally free from blame if he was cutting far from any public way, or in the middle of a field, even though he has not called out, for by such a place no stranger has a right to pass.

D. ix. 2. 31.

6. Præterea si medicus, qui servum tuum secuit, dereliquerit curationem atque ob id mortuus fuerit servus, culpæ reus est.

6. So, again, a physician who has performed an operation on your slave, and then neglected to attend to his cure, so that the slave dies, is guilty of a fault.

D. ix. 2. 8. pr.

7. Imperitia quoque culpæ adnumeratur, veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit.

7. Unskilfulness is also reckoned as a fault, as if a physician kills your slave by unskilfully performing an operation on him, or by giving him wrong medicines.

D. ix. 2. 7. 8; D. ix. 2. 8. pr.; D. l. 17. 132.

8. Impetu quoque mularum, quas mulio propter imperitiam retinere non potuerit, si servus tuus oppressus fuerit, culpæ reus est mulio. Sed et si propter infirmitatem retinere eas non potuerit, cum alius firmior retinere potuisset, æque culpæ tenetur. Eadem placuerunt de eo quoque, qui, cum equo veheretur, impetum ejus aut propter infirmitatem aut propter imperitiam suam retinere non potuerit.

8. So, too, if a muleteer, through his want of skill, cannot manage his mules, and runs over your slave, he is guilty of a fault. As, also, he would be, if he could not hold them in on account of his weakness, provided that a stronger man could have held them in. The same decision applies to a person on horseback who is unable to manage his horse, owing to physical weakness or want of skill.

D. ix. 2. 8. 1.

9. His autem verbis legis 'quanti id in eo anno plurimi fuerit' illa sententia exprimitur, ut si quis hominem tuum, qui hodie claudus aut luscus aut mancus erit, occiderit, qui in eo anno integer aut pretiosus fuerit, non tanti teneatur, quanti is hodie erit, sed quanti in eo anno plurimi fuerit. Qua ratione creditum est, pœnalem esse hujus legis actionem, quia non solum tanti quisque obligatur, quantum damni dederit, sed aliquando longe pluris: ideoque constat, in heredem eam actionem non transire, quæ transitura fuisset, si ultra damnum numquam lis æstimaretur.

9. The words of the law above quoted, 'the greatest value the thing has possessed at any time within a year previously,' mean that if your slave is killed, being at the time of his death lame, one-eyed, or maimed, but having been within a year quite sound and of considerable value, the person who kills him is bound to pay, not his actual value, but the greatest value he ever possessed within the year. Hence, this action may be said to be penal, as a person is bound under it not only for the damage he has done, but sometimes for much more; and, therefore, the action does not pass against his heir, as it would do if the condemnation did not exceed the amount of the actual damage.

Gai. iii. 214; D. ix. 2. 23. 3, 8.

10. Illud non ex verbis legis, sed ex interpretatione placuit, non solum perempti corporis æstimationem habendam esse secundum ea, quæ diximus, sed eo amplius quidquid præterea, perempto eo corpore, damni vobis adlatum fuerit, veluti si servum tuum heredem ab aliquo institutum ante quis occiderit, quam is jussu tuo adiret: nam hereditatis quoque amissæ rationem esse habendam constat. Item si ex pari mularum unam vel ex quadriga equorum unum occiderit, vel ex comœdis unus servus fuerit occisus: non solum occisi fit æstimatio, sed eo amplius id quoque computatur, quanto depretiati sunt, qui supersunt.

10. It has been decided, not by virtue of the actual wording of the law, but by interpretation, that not only is the value of the thing perishing to be estimated as we have said, but also the loss which in any way we incur by its perishing; as, for instance, if your slave having been instituted heir by some one is killed before he enters at your command on the inheritance, the loss of the inheritance should be taken account of. So, too, if one of a pair of mules, or of a set of four horses, or one slave of a band of comedians, is killed, account is to be taken not only of the value of the thing killed, but also of the diminished value of what remains.

Gai. iii. 212; D. ix. 2. 22. 1.

11. Liberum est autem ei, cujus servus fuerit occisus, et privato judicio legis Aquiliæ damnum persequi et capitalis criminis eum reum facere.

11. The master of a slave who is killed may bring a private action for the damages given by the *lex Aquilia*, and also bring a capital charge against the murderer.

Gai. iii. 213.

A *crimen capitale* was one which affected the *caput* of the condemned. The *lex Cornelia* (D. ix. 2. 23. 9; see also Title 18. 5 of this Book) gave the master the power to bring a criminal accusation against the murderer. The Code (iii. 35. 3) contains a rescript of the Emperor Gordian, stating it as undoubted law that a criminal accusation did not prevent a master also bringing a private action under the *lex Aquilia*. The *crimen capitale* could be brought only in cases of murder, not in cases of homicide.

12. Caput secundum legis Aquiliæ in usu non est.

12. The second head of the *lex Aquilia* is not now in use.

GAI. iii. 215; D. ix. 2. 27. 4.

We learn from Gaius (GAI. iii. 215) that the second head of the *lex Aquilia* gave an action for the full value of the injury sustained to a stipulator, whose claim was extinguished by an adstipulator releasing the debtor by acceptilation. (See Bk. iii. Tit. 29. 1.) The stipulator might also have brought an *actio mandati* against the adstipulator, if he preferred doing so; but, as we see from Title 16 of this Book (paragr. 1), proceeding under the *lex Aquilia* gave the plaintiff the advantage of having the amount he recovered doubled if the defendant denied his liability. (GAI. iii. 216.)

13. Capite tertio de omni cetero damno cavetur. Itaque si quis servum vel eam quadrupedem, quæ pecudum numero est, vulneraverit sive eam quadrupedem, quæ pecudum numero non est, veluti canem aut feram bestiam, vulneraverit aut occiderit, hoc capite actio constituitur. In ceteris quoque omnibus animalibus, item in omnibus rebus, quæ anima carent, damnum injuria datum hac parte vindicatur. Si quid enim ustum aut ruptum aut fractum fuerit, actio ex hoc capite constituitur: quamquam potuerit sola rupti appellatio in omnes istas causas sufficere: ruptum enim intellegitur quoquo modo corruptum. Unde non solum usta aut fracta, sed etiam scissa et collisa et effusa et quoquo modo perempta atque deteriora facta hoc verbo continentur: denique responsum est, si quis in alienum vinum aut oleum id immiserit, quo naturalis bonitas vini vel olei corrumperetur, ex hac parte legis eum teneri.

13. The third head provides for every kind of damage; and therefore, if a slave, or a four-footed beast of those reckoned among cattle, is wounded, or a four-footed beast of those not reckoned among cattle, as a dog or wild beast, is wounded, or killed, an action may be brought under the third head. Compensation may also be obtained under it for all wrongful injury to animals or inanimate things, and, in fact, for anything burnt, broken, or fractured, although the word broken (*ruptum*) would have sufficed for all these cases; for a thing is *ruptum* which is in any way spoilt (*corruptum*), so that not only things burnt or fractured, but also things cut, bruised, spilt, or in any way destroyed or deteriorated, may be said to be *rupta*. It has also been decided, that any one who mixes anything with the oil or wine of another, so as to spoil the goodness of the wine or oil, is liable under this head of the *lex Aquilia*.

GAI. iii. 217; D. ix. 2. 27. 13, 15.

The terms of this third head of the Aquilian law are given by Ulpian (D. ix. 2. 27. 5): '*Ceterarum rerum, præter hominem*

et pecudem occisos, si quis alteri damnum faxit, quod usserit, fregerit, ruperit injuria, quanti ea res erit in diebus triginta proximis, tantum æs domino dare damnas esto'.

14. Illud palam est, sicut ex primo capite ita demum quisque tenetur, si dolo aut culpa ejus homo aut quadrupes occisus occisave fuerit, ita ex hoc capite ex dolo aut culpa de cetero damno quemque teneri. Hoc tamen capite non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.

14. It is evident that, as a person is liable under the first head, if by wilful injury or by his fault he kills a slave or a four-footed beast, so, by this head, a person is liable for every other damage, if there is wrongful injury or fault in what he does. But under this head, the offender is bound to pay the greatest value the thing has possessed, not within the year next preceding, but the thirty days next preceding.

GAI. iii. 218; D. ix. 2. 30. 3.

15. Ac ne 'plurimi' quidem verbum adjicitur; sed Sabino recte placuit, perinde habendam æstimationem, ac si etiam hac parte 'plurimi' verbum adjectum fuisset: nam plebem Romanam, quæ Aquilio tribuno rogante hanc legem tulit, contentam fuisse, quod prima parte eo verbo usa est.

15. Even the word *plurimi*, i.e. of the greatest value, is not expressed in this case. But Sabinus was rightly of opinion, that the estimation ought to be made as if this word was in the law, since it must have been that the plebeians, who were the authors of this law on the motion of the tribune Aquilius, thought it sufficient to have used the word in the first head of the law.

GAI. iii. 218; D. ix. 2. 29. 8; D. ix. 2. 1. 1.

16. Ceterum placuit, ita demum ex hac lege actionem esse, si quis [præcipue] corpore suo damnum dederit. Ideoque in eum, qui alio modo damnum dederit, utiles actiones dari solent: veluti si quis hominem alienum aut pecus ita incluserit, ut fame necaretur, aut jumentum tam vehementer egerit, ut rumperetur, aut pecus in tantum exagitaverit, ut præcipitaretur, aut si quis alieno servo persuaserit, ut in arborem ascenderet vel in puteum descenderet, et is ascendendo vel descendendo aut mortuus fuerit aut aliqua parte corporis læsus erit, utilis in eum actio datur. Sed si quis alienum servum de ponte aut ripa in flumen dejecerit et is suffocatus fuerit, eo, quod projecerit corpore suo, damnum dedisse non difficiliter intellegi poterit ideoque ipsa lege Aquilia tenetur. Sed si non corpore damnum fuerit datum neque corpus læsum fuerit, sed alio modo damnum alicui contigit, cum non sufficit neque directa neque utilis Aquilia, placuit eum, qui obnoxius fuerit, in factum actione teneri: veluti si quis, misericordia

16. But the direct action under this law can only be brought if any one has, with his own body, done damage, and consequently *utiles actiones* are given against the person who does damage in any other way. For instance, a *utilis actio* is given against one who shuts up a slave or a beast, so as to produce death by hunger; who drives a beast so fast as to seriously injure it, or scares cattle so that they rush over a precipice, or persuades another man's slave to climb a tree, or go down into a well, and the slave in climbing or descending is killed or maimed. But if any one has flung the slave of another from a bridge or a bank into a river, and the slave is drowned, then, as he has actually flung him down, there can be no difficulty in deciding that he has caused the damage with his own body, and consequently he is directly liable under the *lex Aquilia*. But if no damage has been done by the body of the wrongdoer, and the body of the object affected has not been injured, but damage has been done to the person or thing in some other way, then, since the *actio directa* and the *actio utilis* are

ductus, alienum servum compeditum solverit, ut fugeret.

both inapplicable, it has been decided that an *actio in factum* shall lie against the wrongdoer; for instance, if any one through compassion has loosed the fetters of a slave, to enable him to escape.

GAI. iii. 219 D. ix. 2. 33. 1; D. iv. 3. 7. 7.

If the injury was done, to use the language of the jurists, *corpore corpori*, that is, with direct bodily force to the body of a slave or beast, the *actio* (*legis*) *Aquiliæ* had place. If it was done *corpori*, but indirectly and not *corpore*, the *actio utilis Aquiliæ* had place. If it was done neither to the body, nor yet with direct bodily force, the *actio* must be brought *in factum*, that is on the particular circumstances of the case.

Si quis præcipue. Huschke suggests that *præcipue* has crept into the text from the gloss of a commentator who meant to suggest that the injury might be done with an instrument held in the hand, and so forming part of the body, of the wrongdoer.

The *directa actio Aquiliæ* could only be brought by the owner; the *utilis* might be brought by the possessor, usufructuary, and others having an interest less than that of ownership. (D. ix. 2. 11. 6, 10.)

As the action under the *lex Aquilia* was penal, if the damage was caused by more persons than one, the whole sum could be recovered separately against each offender. (D. ix. 2. 11. 2.)

If the defendant denied his liability, the penalty under the *lex Aquilia* was doubled, *adversus inficiantem in duplum actio est.* (D. ix. 2. 2. 1.)

It might very often happen that the person injured could also bring an action arising from a contract against the doer of the injury, as, for instance, an *actio pro socio, mandati, depositi*, if the person who did the injury was a partner, a mandatary, or depositary of the person to whom the injury was done. In such a case he could either bring an action on the contract, or proceed under the *lex Aquilia*. He could not do both; but if he brought the action on the contract, and then found that if he had proceeded under the *lex Aquilia* he would have recovered a larger sum, he was allowed to bring an action under the *lex Aquilia* to recover the surplus. (D. ix. 2. 7. 8; D. xliv. 7. 34. 2.)

The subject of *damnum* is hardly noticed in the Institutes, except in connection with the *lex Aquilia*. (See Bk. iii. Tit. 18. 2.) By *damnum* is meant the diminution or deterioration of a man's property, and it is treated of in the Digest according as it is *factum*, that is already done, or *infectum*, that is apprehended, as if an adjoining house seemed likely to fall. (D. xxxix. 2.) *Damnum factum*, more usually termed simply *damnum*, might arise from a mere accident, or from the free will of another. If it arose in the latter way, it might have arisen in the exercise of a right enjoyed by the person causing it, and then no reparation had to be made for

causing it, *non videtur vim facere qui jure suo utitur* (D. l. 17. 155); or it might have been done wrongfully, *damnum injuria datum*, and then the person injured was entitled to compensation according to the rates provided by the *lex Aquilia*, if the damage came within the scope of the law; if it did not, then an *actio in factum* was given (D. ix. 2. 33. 1), and compensation was made at rates differing according to the degree of wrong. If there had been *dolus* or *culpa lata*, the compensation was regulated by the value peculiar to the person injured: if the degree of *culpa* had been less, the common value was the measure of the compensation. In cases of *damnum infectum*, the owner of the property threatened could call on the owner of the property from which danger was apprehended to give security against any loss which might thus arise. (D. xxxix. 2. 7. pr.)

TIT. IV. DE INJURIIS.

Generaliter injuria dicitur omne, quod non jure fit: specialiter alias contumelia, quæ a contemnendo dicta est, quam Græci ὕβριν appellant, alias culpa, quam Græci ἀδίκημα dicunt, sicut in lege Aquilia damnum injuria accipitur, alias iniquitas et injustitia, quam Græci ἀδικίαν vocant. Cum enim prætor vel judex non jure contra quem pronuntiat, injuriam accepisse dicitur.

Injuria, in its general sense, signifies every action contrary to law: in a special sense, it means, sometimes, the same as *contumelia* (insult), which is derived from *contemnere*, and is in Greek ὕβρις; sometimes the same as *culpa* (fault), in Greek ἀδίκημα, as in the *lex Aquilia*, which speaks of damage done *injuria;* sometimes it has the sense of iniquity, injustice, or in Greek ἀδικία; for a person against whom the prætor or judge pronounces an unjust sentence is said to have received an *injuria.*

D. xlvii. 10. 1. pr.

Injuria, then, is used in three special senses—1, a wrongful act, an act done *nullo jure;* 2, the fault committed by a judge who gives judgment not according to *jus;* 3, an outrage or affront. It is of *injuria* in this last sense than the present title treats.

1. Injuria autem committitur non solum, cum quis pugno puta aut fustibus cæsus vel etiam verberatus erit, sed etiam si cui convicium factum fuerit, sive cujus bona quasi debitoris possessa fuerint ab eo, qui intellegebat nihil eum sibi debere, vel si quis ad infamiam alicujus libellum aut carmen scripserit, composuerit, ediderit dolove malo fecerit, quo quid eorum fieret, sive quis matremfamilias aut prætextatum prætextatamve adsectatus fuerit, sive cujus pudicitia attentata esse dicetur: et denique aliis pluribus

1. An injury is committed not only when any one is wounded or beaten, as, for example, with the fist or a club, but also when public insult is offered to any one; as when possession is taken of the goods of any one on the pretence that he is a debtor to the wrongdoer, who knows he has no claim on him; or when any one has written, composed, and published a book or defamatory verses against another, or has maliciously contrived that any such thing should be done; or when any one has followed after an honest woman, or a young boy or girl, or has attempted

modis admitti injuriam manifestum est.

the chastity of any one; and, in short, it is manifest that in many other ways injury is committed.

GAI. iii. 220.

Convicium. Ulpian gives (D. xlvii. 10. 15. 4) the following derivation of the word: '*Convicium autem dicitur vel a concitatione vel a conventu, hoc est a collatione vocum; quum enim in unum complures voces conferuntur, convicium appellatur, quasi convocium,*' any proceeding which publicly insults or annoys another, as gathering a crowd round a man's house, or shouting out scandal respecting another to a mob.

Matremfamilias, i.e. every married woman of honest character.

Prætextatum, -am, i.e. still wearing the *prætexta*, which was put off at the age of puberty.

Adsectatus fuerit. Ulpian says (D. xlvii. 10. 15. 22), '*Adsectatur qui tacitus frequenter sequitur, assidua enim frequentia quasi præbet nonnullam infamiam*'.

Pudicitia attentata. Paul says (D. xlvii. 10. 10), '*Attentari pudicitia dicitur cum id agitur, ut ex pudico impudicus fiat*'.

2. Patitur autem quis injuriam non solum per semet ipsum, sed etiam per liberos suos, quos in potestate habet: item per uxorem suam, id enim magis prævaluit. Itaque si filiæ alicujus, quæ Titio nupta est, injuriam feceris, non solum filiæ nomine tecum injuriarum agi potest, sed etiam patris quoque et mariti nomine. Contra autem, si viro injuria facta sit, uxor injuriarum agere non potest: defendi enim uxores a viris, non viros ab uxoribus æquum est. Sed et socer nurus nomine, cujus vir in potestate est, injuriarum agere potest.

2. A man may receive an injury, not only in his own person, but in that of his children in his power, and also in that of his wife, according to the opinion that has prevailed. If, therefore, you injure a daughter in the power of her father, and married to Titius, the action for the injury may be brought, not only in the name of the daughter herself, but also in that of the father and in that of the husband. But, if a husband has sustained an injury, the wife cannot bring the *actio injuriarum*, for the husband is rightly the protector of the wife, not the wife of the husband. But the father-in-law may also bring this action in the name of his daughter-in-law, if her husband is in his power.

GAI. iii. 221; D. xlvii. 10. 2; D. xlvii. 10. 1. 3.

Each person injured could bring an action. Take, for instance, the case of a married woman. She, her husband, her own father, and her husband's, have each an action, supposing both she and her husband are *in potestate*. But a person *in potestate*, though he had an action, could not bring it himself, except in certain cases, as in the absence of the *paterfamilias*. The *paterfamilias* would bring the action, and could sue either in his son's name or his own. The amount recovered in the respective actions differed according to the dignity of the person bringing it. It might happen, for instance, that the son was of higher rank than the father. *Cum utrique tam filio quam patri adquisita actio sit, non eadem utique facienda æstimatio est: cum possit propter filii dignitatem*

major ipsi quam patri injuria facta esse. (D. xlvii. 10. 30, 31.) Although the wife was in power of the father, yet her husband could always bring an action for injury done to her, grounded on his natural duty to protect her.

3. Servis autem ipsis quidem nulla injuria fieri intellegitur, sed domino per eos fieri videtur: non tamen iisdem modis, quibus etiam per liberos et uxores, sed ita cum quid atrocius commissum fuerit et quod aperte ad contumeliam domini respicit: veluti si quis alienum servum verberaverit, et in hunc casum actio proponitur. At si quis servo convicium fecerit vel pugno eum percusserit, nulla in eum actio domino competit.

3. An injury cannot, properly speaking, be done to a slave, but it is the master who, through the slave, is considered to be injured: not, however, in the same way as through a child or wife, but only when the act is of a character grave enough to make it a manifest insult to the master, as if a person has flogged the slave of another, in which case this action is given against him. But a master cannot bring an action against a person who has publicly insulted his slave, or struck him with his fist.

GAI. iii. 222.

Under the civil law the master could not bring an action for injury done to his slave, unless the injury was done with intent to hurt or annoy the master. But the prætor gave an action *pleno jure*, i.e. which could be brought as a matter of right, if the slave was beaten or tortured without the master's orders, and an action *cognita causa*, i.e. allowed if the circumstances of the case seemed, on inquiry, to furnish good ground for it, if the injury had been slighter. (D. xlvii. 10. 15. 34.) Regard was had, in making this inquiry, and in estimating the amount of damage, to the class of slaves to which the slave belonged. (See paragr. 7.) The slave himself could in no case bring an action for injury sustained by him.

4. Si communi servo injuria facta sit, æquum est, non pro ea parte, qua dominus quisque est, æstimationem injuriæ fieri, sed ex dominorum persona, quia ipsis fit injuria.

4. If an injury has been done to a slave held in common, equity demands that it shall be estimated not according to their respective shares in him, but according to their respective position, for it is the masters who are injured.

If the co-proprietors brought the action for injury done, or intended to be done, to them through their slave, then, as it is said in the text, it made no difference what was the amount of their interest in the slave. Each had equally had an insult offered him. But the co-proprietors might bring a prætorian action for harm done to the slave, when no insult or hurt was intended to them; but the only question was, how much was the slave damaged and made unfit for work? and then the amount recovered was divided between them, proportionately to their respective interests in the slave. (See note on last paragr., and D. xlvii. 10. 16.)

5. Quodsi ususfructus in servo Titii est, proprietas Mævii est,

5. If Titius has the usufruct, and Mævius the property, in a slave, the

magis Mævio injuria fieri intellegitur.

injury is considered to be done rather to Mævius than to Titius.

D. xlvii. 10. 15. 47.

It might, however, happen that it could be shown that the intention was to injure and insult the usufructuary more than the proprietor. (D. xlvii. 10. 15. 48.)

6. Sed si libero, qui tibi bona fide servit, injuria facta sit, nulla tibi actio dabitur, sed suo nomine is experiri poterit: nisi in contumeliam tuam pulsatus sit, tunc enim competit et tibi injuriarum actio. Idem ergo est et in servo alieno bona fide tibi serviente, ut totiens admittatur injuriarum actio, quotiens in tuam contumeliam injuria ei facta sit.

6. If the injury has been done to a freeman, who serves you *bona fide* as a slave, you have no action, but he can bring an action in his own name, unless he has been injured merely to insult you, for, in that case, you also may bring the *actio injuriarum*. So, too, with regard to a slave of another who serves you *bona fide*, you may bring this action whenever the slave is injured for the purpose of insulting you.

D. xlvii. 10. 15. 48.

7. Pœna autem injuriarum ex lege duodecim tabularum propter membrum quidem ruptum talio erat: propter os vero fractum nummariæ pœnæ erant constitutæ quasi in magna veterum paupertate. Sed postea prætores permittebant ipsis, qui injuriam passi sunt, eam æstimare, ut judex vel tanti condemnet, quanti injuriam passus æstimaverit, vel minoris, prout ei visum fuerit. Sed pœna quidem injuriæ, quæ ex lege duodecim tabularum introducta est, in desuetudinem abiit: quam autem prætores introduxerunt, quæ etiam honoraria appellatur, in judiciis frequentatur. Nam secundum gradum dignitatis vitæque honestatem crescit aut minuitur æstimatio injuriæ: qui gradus condemnationis et in servili persona non immerito servatur, ut aliud in servo actore, aliud in medii actus homine, aliud in vilissimo vel compedito constituatur.

7. The penalty for injuries under the law of the Twelve Tables was a limb for a limb, but if only a bone was fractured, pecuniary compensation was exacted proportionate to the great poverty of the times. Afterwards the prætor permitted the injured parties themselves to estimate the injury, so that the judge should condemn the defendants to pay the sum estimated, or less, as he might think proper. The penalty for injury appointed by the Twelve Tables has fallen into desuetude, but that introduced by the prætors, and termed honorary, is adopted in the administration of justice. For according to the rank and character of the person injured, the estimate is greater or less; and a similar gradation is observed, not improperly, even with regard to a slave, one amount being payable in the case of a slave who is a steward, a second in that of a slave holding an office of an intermediate class, and a third in that of one of the lowest rank, or one condemned to wear fetters.

Gai. iii. 223, 224; D. xlvii. 10. 15. 44.

The greater part of the edict of the prætor on this subject is given by Ulpian in different parts of the extracts from his writings. (See D. xlvii. 10. 15.)

8. Sed et lex Cornelia de injuriis loquitur et injuriarum actionem introduxit. Quæ competit ob eam rem, quod se pulsatum quis verberatumve domumve suam vi in-

8. The *lex Cornelia* also speaks of injuries, and introduced an *actio injuriarum* which may be brought when any one alleges that he has been struck or beaten, or that his house has been

troitam esse dicat. Domum autem accipimus, sive in propria domo quis habitat sive in conducta vel gratis sive hospitio receptus sit.

broken into. And the term 'house' applies whether a man lives in his own house or in a hired one, or in one he has without payment, or if he has been received as a guest.

D. xlvii. 10. 5. pr. and 2.

The *lex Cornelia de sicariis* (see Tit. 18. 5), though chiefly directed against murderers, also contained provisions against other deeds of violence. *Lex itaque Cornelia ex tribus causis dedit actionem: quod quis pulsatus verberatusve domusve ejus vi introita sit.* (D. xlvii. 10. 5. pr.) A civil, as well as a criminal, action could be brought under the *lex Cornelia.* (D. xlvii. 10. 37. 1.)

9. Atrox injuria æstimatur vel ex facto, veluti si quis ab aliquo vulneratus fuerit vel fustibus cæsus: vel ex loco, veluti si cui in theatro vel in foro vel in conspectu prætoris injuria facta sit: vel ex persona, veluti si magistratus injuriam passus fuerit, vel si senatori ab humili injuria facta sit, aut parenti patronoque fiat a liberis vel libertis; aliter enim senatoris et parentis patronique, aliter extranei et humilis personæ injuria æstimatur. Nonnumquam et locus vulneris atrocem injuriam facit, veluti si in oculo quis percussus sit. Parvi autem refert, utrum patrifamilias an filiofamilias talis injuria facta sit: nam et hæc atrox æstimabitur.

9. An injury is said to be of a grave character, either from the nature of the act, as if any one is wounded or beaten with clubs by another; or from the nature of the place, as when an injury is done in a theatre, a forum, or in the presence of the prætor; or from the quality of the person, as when it is a magistrate that has received the injury, or a senator has sustained it at the hands of a person of low condition, or an ascendant or patron at the hands of a child or freedman. For the injury done to a senator, an ascendant, or a patron is estimated differently from an injury done to a person of low condition or to a stranger. Sometimes it is the part of the body injured that gives the character of gravity to the injury, as if any one had been struck in the eye. Nor does it make any difference whether such an injury has been done to a *paterfamilias* or a *filiusfamilias*, for in the latter case also it is considered of a grave character.

GAI. iii. 225; D. xlvii. 10. 7. 8; D. xlvii. 10. 8, 9. 1, 2.

If the injury was *atrox*, a freedman might bring an action against his patron, and the emancipated son against his father, but not otherwise. (D. xlvii. 10. 7. 2, 3.) And the prætor himself, in cases of *atrox injuria*, when he gave the formula to the judge, fixed the maximum of the condemnation, and the judge would not, as a rule, condemn the defendant in a less sum. (GAI. iii. 224.)

10. In summa sciendum est, de omni injuria eum, qui passus est, posse vel criminaliter agere vel civiliter. Et si quidem civiliter agatur, æstimatione facta secundum quod dictum est, pœna imponitur.

10. Lastly, it must be observed, that in every case of injury he who has received it may bring either a criminal or a civil action. In the latter, it is a sum estimated as we have said that constitutes the penalty; in

Sin autem criminaliter, officio judicis extraordinaria pœna reo irrogatur: hoc videlicet observando, quod Zenoniana constitutio introduxit, ut viri illustres quique supra eos sunt, et per procuratores possint actionem injuriarum criminaliter vel persequi vel suscipere secundum ejus tenorem, qui ex ipsa manifestius apparet.

the former, the judge, in the exercise of his duty, inflicts on the offender an extraordinary punishment. We must, however, remark, that a constitution of Zeno permits men of the rank of *illustris*, or of any higher rank, to bring or defend by a procurator the *actio injuriarum* if brought criminally, as may be seen more clearly by reading the constitution itself.

D. xlvii. 10. 6; C. ix. 35. 11.

It was only as a very peculiar exception that criminal actions could, like private actions, be brought or defended through a procurator.

The *viri illustres* constituted the highest rank of the imperial officials—such as the prætorian and urban prefects, the masters of the horse, and the seven ministers of the palace. (GIBBON, ch. 17.)

11. Non solum autem is injuriarum tenetur, qui fecit injuriam, hoc est qui percussit: verum ille quoque continebitur, qui dolo fecit vel qui curavit, ut cui mala pugno percuteretur.

11. Not only is he liable to the *actio injuriarum* who has inflicted the injury, as, for instance, the person who has struck the blow; but he also who has maliciously caused or contrived that any one should be struck in the face with the fist.

D. xlvii. 10. 11. pr.

12. Hæc actio dissimulatione aboletur: et ideo, si quis injuriam dereliquerit, hoc est statim passus ad animum suum non revocaverit, postea ex pœnitentia remissam injuriam non poterit recolere.

12. This action is extinguished by a person acting as if he had not received an injury; and, therefore, a person who has taken no account of the injury, that is, who immediately on receiving it has shown no resentment at it, cannot afterwards change his mind and resuscitate the injury he has allowed to rest.

D. xlvii. 10. 11. 1.

If the person injured, though expressing indignation at the time, did not take any steps towards enforcing reparation within a year, the action was extinct. (D. xlvii. 10. 17. 6; C. ix. 35. 5.) The action was personal to the person injured, and could not be transmitted to his heirs, unless before his death the action had already proceeded as far as the *litis contestatio*. (D. xlvii. 10. 13. pr.)

TIT. V. DE OBLIGATIONIBUS, QUÆ QUASI EX DELICTO NASCUNTUR.

Si judex litem suam fecerit, non proprie ex maleficio obligatus videtur. Sed quia neque ex contractu obligatus est et utique peccasse ali-

If a judge makes a cause his own, he does not, properly speaking, seem to be bound *ex maleficio*; but as he is not bound *ex contractu*, and as

quid intellegitur, licet per imprudentiam: ideo videtur quasi ex maleficio teneri, et in quantum de ea re æquum religioni judicantis videbitur, pœnam sustinebit.

he has, nevertheless, done a wrong, although perhaps only from ignorance, he seems to be bound as it were *ex maleficio*, and will be condemned to the amount which seems equitable to the conscience of the judge.

D. 1. 13. 6.

The Roman law characterised rather arbitrarily certain wrongful acts as delicts, and then, as there were many other wrongful acts which bound the wrongdoer to make reparation, and as it could not be said that the wrongdoer was bound *ex delicto*, he was said to be bound *quasi ex delicto*, i.e. there was an evident analogy between the mode in which the obligation arose from other kinds of wrongdoing and that in which it arose from the kinds of wrongdoing technically called delicts. The principle was exactly the same, but the particular act did not happen to be among those technically termed delicts. The first instance given is that of a judge *qui litem suam fecerit*, that is, who, through favour, corruption, or fear (D. v. 1. 15. 1), or even ignorance of law (*licet per imprudentiam*), gives a manifestly wrong sentence, and who thus makes the *lis* or suit to be *sua*, that is, affect himself by rendering him responsible for the sentence. Gaius gives an example in the case of a judge condemning a defendant in a sum different from that fixed in the *formula*. (GAI. iv. 52.)

The defendant might, if he pleased, instead of bringing an action against the judge, appeal from his decision (see Tit. 17. pr. note); and in some cases, as when the judge had violated public law, or been corrupted, he might treat the decision as null, and commence the action afresh (D. xlix. 1. 19); but his adversary might be insolvent, or his indignation, or many other reasons, might make him prefer suing the judge.

Ducaurroy points out that the distinction made between the seemingly parallel cases of an ignorant physician and an ignorant judge, the fault of the former being punished under the *lex Aquilia*, the latter being bound *quasi delicto*, arises from the injury of the physician being done to the body. The severity of the penalty against a judge who was merely ignorant of the law, is owing probably to the great checks against ignorance which the judge possessed, if he pleased to avail himself of them, in the advice of the '*prudentes*,' whose business it was to assist him, and in the possibility of having recourse to the magistrate who had given the action to him.

1. Item is, ex cujus cœnaculo vel proprio ipsius vel conducto vel in quo gratis habitabat, dejectum effusumve aliquid est, ita ut alicui noceretur, quasi ex maleficio obligatus intellegitur: ideo autem non proprie ex maleficio obligatus intellegitur, quia plerumque ob alterius

1. So, too, he who occupies, whether as proprietor, hirer, or gratuitously, an apartment, from which anything has been thrown or poured down, which has done damage to another, is said to be bound *quasi ex maleficio*, for he is not exactly bound *ex maleficio*, as it is generally by the fault of another, a slave,

culpam tenetur aut servi aut liberi. Cui similis est is, qui ea parte, qua vulgo iter fieri solet, id positum aut suspensum habet, quod potest, si ceciderit, alicui nocere: quo casu pœna decem aureorum constituta est. De eo vero, quod dejectum effusumve est, dupli quanti damnum datum sit, constituta est actio. Ob hominem vero liberum occisum quinquaginta aureorum pœna constituitur: si vero vivet nocitumque ei esse dicetur, quantum ob eam rem æquum judici videtur, actio datur: judex enim computare debet mercedes medicis præstitas ceteraque impendia, quæ in curatione facta sunt, præterea operarum, quibus caruit aut cariturus est ob id, quod inutilis factus est.

for instance, or a child, that he is bound. It is the same with regard to a person who, where there is a public way, keeps something placed or suspended, which may, if it fall, hurt any one; in this case, a penalty has been fixed of ten *aurei*. With respect to things thrown or poured down, an action is given for double the amount of the damage done; and if a freeman has been killed, there is a penalty of fifty *aurei*. If he is not killed, but only hurt, the action is given for the amount which the judge considers equitable under the circumstances; the judge ought to take into account the fees paid to the physician, and all the other expenses of the man's illness, as well as the employment which he has lost, or will lose, by being incapacitated.

D. xliv. 7. 5. 5; D. ix. 3. 5. 6; D. ix. 3. 1. pr.; D. ix. 3. 7.

The edict of the prætor, in the cases referred to in the text, is given, D. ix. 3. 1. pr.; and D. ix. 3. 5. 6.

The action given in each case was *popularis* (D. ix. 3. 5. 13), that is, any one might bring it, but in the case of a freeman being killed, his heirs or relations, if they brought an action, were preferred to strangers. (D. ix. 3. 5. 5.)

2. Si filiusfamilias seorsum a patre habitaverit et quid ex cœnaculo ejus dejectum effusumve sit, sive quid positum suspensumve habuerit, cujus casus periculosus est: Juliano placuit, in patrem nullam esse actionem, sed cum ipso filio agendum. Quod et in filiofamilias judice observandum est, qui litem suam fecerit.

2. If a *filiusfamilias* lives apart from his father, and from a room in his house anything is thrown or poured down, or anything is placed or suspended, the fall of which would be dangerous, Julian thinks that no action could be brought against the father, but only against the son. The same rule should hold good with respect to a *filiusfamilias* who, being a judge, has made a cause his own.

D. xliv. 7. 5. 5; D. v. 1. 15. pr.

The *filiusfamilias* could be sued himself for delicts, but the father was not obliged to repair the injury done even to the extent of the son's *peculium*, which was only made to meet the contracts or quasi-contracts of the son; but if a slave had done the injury the master was always bound to repair the damage, or to abandon the slave. (See Tit. 8. 7.)

3. Item exercitor navis aut cauponæ aut stabuli de damno, dolo aut furto, quod in nave aut in caupona aut in stabulo factum erit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicujus eorum, quorum opera navem aut cauponam aut stabulum exer-

3. The master of a ship, of an inn, or a stable, is liable *quasi ex maleficio* for any damage, through fraud or theft, occurring in the ship, inn, or stable, that is, if it is not he who has committed the wrongful deed, but some one employed in the service of the ship, inn, or stable. For as the ac-

ceret: cum enim neque ex contractu sit adversus eum constituta hæc actio et aliquatenus culpæ reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur. In his autem casibus in factum actio competit, quæ heredi quidem datur, adversus heredem autem non competit.

tion given against him does not arise *ex contractu*, and as he is so far in fault in employing bad persons as his servants, he seems to be bound *quasi ex maleficio*. In these cases it is an action *in factum* that is given, and it may be brought by the heir, but not against the heir.

D. xliv. 7. 5. 6; D. ix. 3. 5. 13.

The action was for double the value of the thing damaged or lost. (D. xlvii. 5. 2.) The person injured might also, at his option, have an *actio furti*, or *Aquiliæ*, as the case might be, against the actual wrongdoer. (D. xlvii. 5.) This action was different from that given by the prætor against innkeepers and others for the restoration of things confided to them. (D. iv. 9.)

TIT. VI. DE ACTIONIBUS.

Superest, ut de actionibus loquamur. Actio autem nihil aliud est, quam jus persequendi judicio, quod sibi debetur.

It now remains that we speak of actions. An action is nothing else than the right of suing before a judge for that which is due to us.

D. xliv. 7. 51.

We now come to the last division of the Institutes, that which treats of actions and the subsidiary subjects of exceptions and interdicts. A sketch has been given in the Introduction (sec. 90-111) of the old legal actions, of the formulary system, and of the system of *extraordinaria judicia*, by which, long before the time of Justinian, the formulary system had been replaced. In treating of actions the Institutes make such constant reference to the formulary system, and generally to the prætorian law on the subject, that it is necessary, for the comprehension of this part of the Institutes, to set out with a knowledge of the law of actions while the formulary system prevailed. For a statement of the mode in which this system replaced the older actions, and of the scheme of the *formulæ*, the reader is referred to sections 98 to 106 of the Introduction. But it will be convenient to add here an outline of the principal divisions of actions under the prætorian system, and to connect these divisions with the corresponding paragraphs of this Sixth Title.

1. *Actiones in rem, in personam.* A main division of actions is that into real actions and personal actions, a division based on the difference in the thing which the plaintiff claims to be due. In a real action, the plaintiff claims that, as against all the world, a thing corporeal or incorporeal is his. The *intentio* of such an action ran—*Si paret hominem ex jure Quiritium Auli Agerii esse.* But under the formulary system every condemnation was in

a sum of money. It was the value of the thing, not the thing, that was awarded; and so the *condemnatio* in a real action ran—*Quanti ea res erit, tantam pecuniam Numerium Negidium Aulo Agerio condemna; si non paret, absolve.* Actions *in rem* were, however, as is explained below, *arbitrariæ*, i.e. the judge ordered the unsuccessful defendant to restore the thing, and, if he failed to do so, condemned him in the sum of money. This was supposed to meet all the circumstances of the case. It seems, too, that, at any rate in the time of Ulpian, if the thing being in the possession of the defendant was not restored according to the order, force was employed under the direction of the judge to put the plaintiff in possession of it. (D. vi. 1. 68; see note on paragr. 31.) In all actions, when a defendant did not pay, he was liable, under the legislation of Antoninus Pius, to have sufficient of his goods to meet the liabilities seized and sold. (D. xlii. 1. 31.) (As to modes of execution see Introd. sec. 108, 111.)

A personal action was one in which the plaintiff claimed that the defendant should give, do, or make good something to or for him—*Qua intendimus dare, facere, præstare oportere.* For *præstare*, as in the action of theft (GAI. iv. 37), the words *damnum decidere*, to make good the loss, were sometimes substituted. *Condictio*, used sometimes in the general sense of a personal action, had a special sense. Originally the *condictio* was the action by which the plaintiff demanded that the defendant should give, i.e. make over the full property in, something, and the thing to be given was something *certum*. It was therefore specially attached to unilateral contracts, i.e. to contracts made *re* (which, it will be remembered, are, with the exception of *mutuum*, bilateral only indirectly) or *verbis* or *litteris*, or to such obligations *quasi ex contractu* as that to restore money unduly paid. But the *condictio* was extended to things uncertain, to the giving or doing something which was not fixed; and the *condictio* in its primary application received the name of *condictio certi*, and in its extended application that of *condictio incerti*, and the *condictio certi*, or simply *condictio*, was limited by usage to actions brought on contracts *re*, *verbis*, or *litteris*, while *condictiones certi*, brought on other grounds, received special names, as the *condictio indebiti*, brought to enforce the repayment of money unduly paid. The *condictio incerti* always received a special name, according to the obligation it was brought to enforce, as *ex stipulatu*. (See Bk. iii. Tit. 15. pr.) Lastly, as the old *condictio certi* was, when first introduced by the *lex Silia* (B.C. 243), given to enforce the giving of a fixed sum of money, and only extended by the *lex Calpurnia* (B.C. 233) to enforce the giving of other fixed things, the *condictio*, when brought for anything else except a fixed sum of money, and whether *certi* or *incerti*, was spoken of as *triticaria* (D. xiii. 3. 1. pr.), from *triticum*, wheat, one of the objects comprised in the extension made by the *lex Calpurnia*. The *intentio* in the *condictio certi* ran—*Si paret oportere dare* (*decem aureos*);

and in the *condictio incerti*—*Quicquid paret dare, facere oportere*. Every action *facere* being necessarily uncertain, the *condemnatio* was necessarily uncertain, and so it was when *dare* even in *condictiones certi*, if the action was for anything but a fixed sum of money. If, for example, the action was to give a fixed amount of wheat, as every *condemnatio* was in a pecuniary shape, the defendant was condemned in the value, whatever it might be, of that amount of wheat—*Quanti ea res erit.*

2. *Actiones in jus, in factum, directæ, utiles, fictitiæ, in factum præscriptis verbis.* These terms applied to actions indicate the modes in which the prætor extended or modified the law by the shape he gave to the formula. In shaping actions the prætor introduced changes of two kinds. First, he gave actions for the enforcement of rights altogether outside the old civil law, but sanctioned by the edict; or, secondly, he extended existing actions (generally civil, but sometimes prætorian) to cases and persons outside the limits in which these actions could be brought.

The principal mode in which he effected the first object was to frame the action so as to be *in factum*. Probably the *actio in factum concepta* shows the formula as framed in its earliest stage. The *demonstratio* and *intentio* were confounded or united in it. The prætor merely said, 'If such a fact appears to be true, condemn the defendant'. Such a formula would enable the prætor to give legal remedies to persons who, under the civil law, could not sue, as *peregrini* or *filiifamiliarum*, or to give a legal remedy where none previously existed. When, on the other hand, the formula was applied to actions properly within the sphere of the civil law, then the formula had reference to this law; and in the *intentio*, separated from the *demonstratio*, it was said, 'If the plaintiff has such and such a legal right, or the defendant is legally bound (*oportet*) to give or do, then condemn'. Reference being made to the law in this way, the formula was said to be *in jus concepta*.

When there was an existing action and the prætor wished to extend it to persons or cases not within its sphere, the existing action was termed *directa*, and the extended action *utilis*. In framing *actiones utiles*, the prætor had two resources. He either gave an *actio in factum*, i.e. stated that if a fact was ascertained the defendant was to be condemned, so that *actiones in factum* were used both to give a new remedy and to enlarge an existing action, or he devised a fictitious action *in jus* (*actio fictitia*). He said, 'If something was true which is not true, then what would the plaintiff's legal rights be?' For example, if a plaintiff claimed as if he had acquired by usucapion before the time of usucapion had run, the prætor said, *si anno possedisset*, what would be the plaintiff's rights? and the judge treated the plaintiff as if the year had run. (Gai. iv. 30-38.)

Lastly, in such a case as that of an innominate contract executed on one side, the prætor gave an action *in jus* termed *actio*

in factum præscriptis verbis, which was exactly like an action *in jus* on a nominate contract, only that, as the contract did not fall under one of the recognised heads, the facts had to be stated in order to show how the legal obligation had arisen.

3. *Actiones stricti juris, bonæ fidei, arbitrariæ.* This division depends on the varying amount of latitude given to the judge. The action might be one *in jus concepta*, and within the limits of the civil law; and then the judge had simply to decide the question submitted to him without taking into account any considerations of equity. But in some actions of this kind the prætor added the words *ex fide bona, quod æquius,melius*, or some equivalent expression; and then the judge imported equitable considerations, i.e. he took notice of *dolus* without an *exceptio doli mali* being inserted; he looked to customs and usages; he took cognisance of set-off (*compensatio*), without the set-off being distinctly brought before him by the formula; he allowed interest from the time of default. The actions in which the judge had this latitude allowed him were termed *bonæ fidei actiones*, as opposed to those *stricti juris*, where he had no such latitude; and, speaking generally, unilateral obligations gave rise to actions *stricti juris*, and bilateral obligations gave rise to actions *bonæ fidei*. This division referred, however, to personal actions. In real actions the judge had a latitude by the actions being what was termed *arbitrariæ*, i.e. an order to restore the thing was made, and if the thing was not restored (*nisi restituat*), then the defendant was condemned in a pecuniary equivalent fixed after taking all circumstances into account, and, as has been stated above, the defendant, if in possession, was forced to give up the thing. Some special personal actions, such as the *actio ad exhibendum*, were also made *arbitrariæ*.

Actions *in factum* were not exactly *stricti juris* or *bonæ fidei*, terms only applied to actions *in jus conceptæ*, but practically they approached *bonæ fidei* actions, as the prætor directed a condemnation if the facts were found as he thought proper to state them; some of them were made *arbitrariæ*; and all *condictiones incerti* were so far like actions *bonæ fidei* that the judge had to fix the pecuniary value, as he might think proper, of an uncertain thing.

4. *Judicia legitima, imperio continentia.* There is one more division of actions to be noticed in connection with the formulary system. We may ask as to actions (1) how long the right of bringing the action lasts after it has once arisen; (2) within what time the suit must be finished, so that, if the suit is not finished in the time, it must be recommenced; (3) whether the effect of the judgment is to bar fresh proceedings. Under the formulary system the answer to these questions was determined by technical distinctions, depending partly on the nature of the action, and partly on the authority of the magistrate. To sum up the results briefly, we may say (1) that all actions could be

brought at any time after the cause of action had arisen, except prætorian actions for a penalty or in derogation of a statute (see note on Tit. 12. pr.); (2) that *judicia legitima*, i.e. the proceedings in actions in which the parties were Roman citizens, and there was only one judge, also a Roman citizen, and the cause was tried in Rome or within a mile of Rome, must, under the *lex Julia judiciaria*, be finished within eighteen months after the formula was given, and those in other actions were measured by the authority of the magistrate, *judicia imperio continentia*, and must be finished within the term of office of the magistrate who gave the formula (GAI. iv. 104, 105); and (3) that when *judicia legitima* were *in personam*, and there was an *intentio juris civilis*, the judgment in them barred further proceedings, but that in all other actions, and in *judicia legitima* when the formula was *in factum*, fresh proceedings were not barred, but could be stopped by an exception. (GAI. iv. 106, 107; see note on Tit. 13. 5.) But this is a very subsidiary division of actions; the other three—viz. that according to the nature of the thing demanded, that according to the shape of the formula, and that according to the latitude given to the judge—are the principal divisions of actions. But, obviously, the same action may come under more than one division. Thus the *actio Serviana* (par. 7) was a real action *in factum;* the action *de constituta pecunia* (par. 9) was a personal action *in factum;* the *actio empti* (par. 28) was a personal *bonæ fidei* action *in jus concepta*.

The Institutes in this Title notice six divisions of actions: (1) that according to the nature of the thing demanded (*in rem* and *in personam*) (par. 1-11), and (2) that according to the latitude given to the judge (par. 28-31). As the formulary system had passed away, they do not ostensibly notice the division according to the shape of the formula, but they refer to one of its main features by noticing the distinction of actions, (3) according as the action was a prætorian application of the civil law, or was a new creation of the prætor (par. 3-13). The other divisions noticed are subordinate, and refer (4) to the effect of the *condemnatio* according as the action was penal or not (par. 16-20); (5) according as the *condemnatio* was for the simple value, or for the double, treble, or quadruple value (par. 21-27); and (6) according as the whole sum in which the defendant might have been condemned was recoverable or not (par. 36-40).

1. Omnium actionum, quibus inter aliquos apud judices arbitrosve de qua re quæritur, summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam. Namque agit unusquisque aut cum eo, qui ei obligatus est vel ex contractu vel ex maleficio, quo casu proditæ actiones in personam sunt, per quas intendit, adversarium ei dare facere

1. All actions whatever, by which any matter is submitted to the decision of judges or of arbitrators, may be divided into two classes; for actions are either real or personal. Either the plaintiff sues the defendant, because he is made answerable to him by contract, or by a delict, in which case the plaintiff brings a personal action, alleging that his adversary is bound

oportere et aliis quibusdam modis: aut cum eo agit, qui nullo jure ei obligatus est, movet tamen alicui de aliqua re controversiam. Quo casu proditæ actiones in rem sunt. Veluti si rem corporalem possideat quis, quam Titius suam esse affirmet, et possessor dominum se esse dicat: nam si Titius suam esse intendat, in rem actio est.

to give to, or to do something for, him, or making some other similar allegation. Or else the plaintiff brings an action against a person not made answerable to him by any obligation, but with whom he disputes the right to something, and for such cases real actions are given; as, for example, if a man is in possession of a corporeal thing, which Titius maintains to be his property, while the possessor says that he himself is the proprietor, here, if Titius asserts that the thing is his, the action is real.

GAI. iv. 1-3; D. xliv. 7. 25. pr.

2. Æque si agat, jus sibi esse re, fundo forte vel ædibus utendi-fruendi vel per fundum vicini eundi, agendi vel ex fundo vicini aquam ducendi, in rem actio est. Ejusdem generis est actio de jure prædiorum urbanorum, veluti si agat, jus sibi esse altius ædes suas tollendi prospiciendive vel projiciendi aliquid vel immittendi in vicini ædes. Contra quoque de usufructu et de servitutibus prædiorum rusticorum, item prædiorum urbanorum invicem quoque proditæ sunt actiones, ut quis intendat, jus non esse adversario utendifruendi, eundi, agendi aquamve ducendi, item altius tollendi, prospiciendi, projiciendi, immittendi: istæ quoque actiones in rem sunt, sed negativæ. Quod genus actionis in controversiis rerum corporalium proditum non est: nam in his is agit, qui non possidet: ei vero, qui possidet, non est actio prodita, per quam neget, rem alterius esse. Sane uno casu qui possidet, nihilo minus actoris partes obtinet, sicut in latioribus digestorum libris opportunius apparebit.

2. So, too, if any one alleges that he has a right to the usufruct, for instance, of land, or of a house, or that he has a right of going, or driving his cattle, or of conducting water, over the land of his neighbour, the action is real; as also are actions relating to servitudes of city estates, as when a man alleges a right to raise his house, a right to an uninterrupted view, a right to make part of his house project, or of inserting the beams of his building into his neighbour's walls. On the other hand there are actions relating to usufructs, and the servitudes of country and city estates, which are the reverse of these; as when the complainant alleges that his adversary is not entitled to the usufruct, or has not the right to go, to drive, to conduct water, to raise his house, to have an uninterrupted view, to throw out projections, or to insert his beams. These actions are equally real, but are negative, and cannot therefore be used in disputes respecting things corporeal, for in these disputes it is the person out of possession who brings the action: for a possessor cannot bring an action to deny that the thing is the property of the other party. There is, however, one case, in which a possessor may act the part of plaintiff; which will be more fully seen if reference is made to the books of the Digest.

GAI. iv. 3; D. viii. 5. 2; D. xxxix. 1. 15.

Usufructs, uses, rural and urban servitudes, might be the objects of real actions. These actions were either *confessoriæ* or *negativæ;* in the former the plaintiff claimed to exercise a servitude over the immoveables of another, in the latter he maintained that a servitude which another attempted to exercise over an immoveable belonging to the plaintiff was not due.

The *actio confessoria* might be brought either when a person claiming a servitude found this right contested, or when any obstacle, as if a tree overhung a way over which a servitude *viæ* or *actus* was claimed, prevented the free enjoyment of the servitude. (D. viii. 5. 4. 5.)

The *actio confessoria* might be brought by the person claiming the servitude, whether he was or was not in possession, that is, in quasi-possession, of the servitude. For example, a man claims a servitude *non altius tollendi*—that his neighbour should not build his house higher than that of the claimant. Before the neighbour has built his house higher the claimant of the servitude is in possession of the servitude. He has his servitude and enjoys the advantages of it. After the neighbour has built his house higher, the claimant of the servitude has his servitude, but is no longer in possession of it. In either case the claimant of the servitude might bring his *actio confessoria* (D. viii. 5. 6. 1), although, if he was still in possession, he was further secured by being allowed to apply, if he pleased, for a prohibitory interdict (see Tit. 15) after interdicts were granted to protect servitudes.

The *actio negativa* was virtually an affirmative action brought by the owner of the immoveable, claiming that the thing was his, freed from the servitude. Originally the possession of a servitude was not protected by interdicts, and the use of the *actio negativa* was to protect the enjoyment of the thing free from the servitude, or, in other words, to protect the enjoyment of that fragment of the *dominium* which constituted the servitude, as well as of all other fragments, while the possession of the thing itself was protected by the interdicts *uti possidetis.* (Tit. 15. 4.) Subsequently the possession of servitudes was protected by interdicts, but still the *actio negativa* remained as a concurrent remedy with the possessory interdict to protect the enjoyment of that fragment of the *dominium* which constituted the servitude, just as the *actio confessoria* remained as a concurrent remedy with the prohibitory interdict to prevent a servitude being infringed.

Sane uno casu. It is a subject of much dispute what is the one case in which the possessor could be plaintiff. Perhaps the words are but a summary of what has gone before. 'There is, indeed, but one case of a person in possession being plaintiff, that, namely, of the possessor of an incorporeal thing.' Perhaps they refer to a person repelling by an *exceptio justi dominii* the *actio Publiciana* noticed in par. 4, as such a person had to prove he was owner.

3. Sed istæ quidem actiones, quarum mentionem habuimus, et si quæ sunt similes, ex legitimis et civilibus causis descendunt. Aliæ autem sunt, quas prætor ex sua jurisdictione comparatas habet tam in rem quam in personam, quas et ipsas necessarium est exemplis

3. The actions just mentioned, and those of a similar nature, are derived from particular laws and from the *jus civile;* but there are others, both real and personal, which the prætor, by virtue of his jurisdiction, has introduced, and of which it is necessary to give some examples: thus the prætor

ostendere. Ecce plerumque ita permittit in rem agere, ut vel actor diceret, se quasi usucepisse, quod usu non ceperit, vel ex diverso possessorem diceret, adversarium suum usu non cepisse, quod usuceperit.

often permits a real action to be brought, by which the plaintiff is allowed to allege that he has acquired, as it were by *usucapio*, something which he has not so acquired; or by which, on the contrary, he alleges that his adversary, the possessor, has not acquired something by *usucapio*, which, in reality, he has so acquired.

D. xliv. 7. 25. 2.

The second division of actions, given in this Title, is that of civil and prætorian. The two methods principally adopted by the prætor to give an action in cases not provided for by the civil law, were, as already stated (pr. note 2), either to construct a formula on a fictitious hypothesis, or make the action one *in factum concepta*. The three following paragraphs give examples of fictitious actions *in rem*.

Justinian notices five prætorian actions *in rem*, viz. the *actio Publiciana*, the *actio in rem rescissoria*, the *actio Pauliana*, the *actio Serviana*, and the *actio quasi-Serviana*, and gives as instances of the numerous prætorian actions *in personam*, the actions *de pecunia constituta*, *de peculio*, &c. (See par. 8 *et seq.*)

4. Namque si cui ex justa causa res aliena tradita fuerit, veluti ex causa emptionis aut donationis aut dotis aut legatorum, necdum ejus rei dominus effectus est, si ejus rei casu possessionem amiserit, nullam habet directam in rem actionem ad eam rem persequendam: quippe ita proditæ sunt jure civili actiones, ut quis dominium suum vindicet. Sed quia sane durum erat, eo casu deficere actionem, inventa est a prætore actio, in qua dicit is, qui possessionem amisit, eam rem se usucepisse et ita vindicat suam esse. Quæ actio Publiciana appellatur, quoniam primum a Publicio prætore in edicto proposita est.

4. For instance, if anything belonging to another is delivered by a legal mode, as by purchase, gift, *dos*, or legacy, to a person who has not yet become proprietor of the thing delivered, if he chances to lose the possession, he has no direct real action for its recovery; inasmuch as the civil law only permits such actions to be brought by the proprietor. But, as it was very hard that there should be no action given in such a case, the prætor has introduced one, in which the person who has lost the possession alleges that he has acquired the thing in question by *usucapio*, although he has not really so acquired it, and he thus claims it as his own. This action is called the *actio Publiciana*, because it was first placed in the edict by the prætor Publicius.

Gai. iv. 36.

When any one except the real owner of the thing (*dominus*) delivered over a thing on a ground and in a mode which would have sufficed to pass the property, if he had had it to pass, or if an owner of a thing transferred a thing by a mode insufficient to pass the *dominium*, as if a *res mancipi* was delivered without mancipation, the person, in either of these cases, to whom the thing was delivered, being a *bona fide* possessor, could perfect his title to it by usucapion; but if he lost the thing out of his possession after it was delivered to him, but before the time necessary

to complete the usucapion had expired, the civil law gave him no remedy, for he was not the *dominus*, and none but a *dominus* could claim a thing by '*vindicatio*'. The *actio Publiciana*, an *actio fictitia in jus concepta*, was therefore given for his relief by the prætor Publicius, perhaps the Publicius mentioned as prætor by Cicero (*Pro Cluent.* 45). In this action the plaintiff was allowed to state what was in fact not true, that the usucapion was complete, and thus to claim as if his ownership was absolute. If the thing had fallen into the hands of a person who himself claimed to be really the *dominus*, and to have a *bona fide* ground of repelling the *actio Publiciana*, it could be repelled by an exception termed the *exceptio justi dominii*. (D. vi. 2. 16.)

If it had fallen into the hands of a person who did not claim to be the owner, but who had so acquired it as to be in a situation to perfect his title by usucapion, i.e. who was also a *bona fide* possessor, and the plaintiff brought an *actio Publiciana* for it before the time of the usucapion had expired, the title of the actual holder of the thing was considered the better; for *in pari causa melior est conditio possidentis*. The formula of the action ran thus: '*Judex esto. Si quem hominem Aulus Agerius emit et is ei traditus esset, anno possedisset, tum si eum hominem, de quo agitur, ejus ex jure Quiritium esse oporteret,*' &c. (GAI. iv. 36.)

The *actio Publiciana* might also be useful to a person who was really the owner; for, while the distinction between *res mancipi* and *nec mancipi* was retained, the owner of a thing requiring to be passed by mancipation might have himself received it by mancipation, but be unable to show that the person who transferred it to him was really the *dominus*, and had in his turn received it by mancipation. If he lost the thing before he had perfected the title by usucapion, he could not bring a *vindicatio*, but was obliged to have recourse to the *actio Publiciana;* and before the legislation of Justinian this action was especially useful to persons who had received a transfer of things which, like provincial lands, could not be made the subject of a perfect *dominium*, and the title to which could not be perfected by usucapion (see Bk. ii. Tit. 6. pr. note); for they were allowed to bring this fictitious action if they were deprived of the possession, at any rate after the time entitling them to use the *præscriptio longi temporis* had elapsed. (C. vii. 39. 8.)

5. Rursus ex diverso si quis, cum rei publicæ causa abesset vel in hostium potestate esset, rem ejus, qui in civitate esset, usuceperit, permittitur domino, si possessor rei publicæ causa abesse desierit, tunc intra annum, rescissa usucapione, eam petere, id est ita petere, ut dicat, possessorem usu non cepisse et ob id suam esse rem. Quod

5. Conversely, if any one, while abroad in the service of his country, or a prisoner in the hands of the enemy, has acquired by usucapion a thing which belongs to another person resident at home, then the proprietor is permitted, within a year after the return of the possessor, to sue for the thing by rescinding the usucapion; that is, he may allege that the posses-

genus actionis et aliis, simili æquitate motus, prætor accommodat, sicut ex latiore digestorum seu pandectarum volumine intellegere licet.

sor has not acquired by *usucapio*, and that the thing therefore is his. Similar feelings of equity have led the prætor to grant this species of action to some other persons also, as may be learned from the larger treatise of the Digest or Pandects.

D. iv. 6. 21; D. iv. 1. 1; D. iv. 6. 1. 1.

This paragraph gives the converse case. Before, the usucapion was not complete, and the action supplied what was wanting to it. Here the usucapion is complete, and the action takes away its effect.

Such an action might be wanted in either of two cases. Either the proprietor of the thing might be absent, or deprived, on some legitimate ground, of the power of attending to his affairs, and during this time the usucapion might have been completed against him; or the possessor, the person in whose favour the time of usucapion was running, might have been absent, and the proprietor, not being able to sue him, might have been unable to stop the usucapion. In either of these cases this *actio in rem*, called *rescissoria*, because the usucapion was rescinded, came to the aid of the proprietor. It is to be remarked that Justinian notices only the latter of the two cases, and yet he had provided a much more simple remedy in behalf of proprietors, who were allowed to interrupt the usucapion of an absent possessor by a protestation made before a magistrate. (C. vii. 40. 2.)

This *actio rescissoria*, an *actio fictitia in jus concepta*, had to be brought within a year, commencing from the time when it first became possible to bring the action. *Intra annum, quo primum de ea re experiundi potestas erit.* (D. iv. 6. 1. 1.) The year was a *utilis annus*, and its length, therefore, varied in different cases, for which Justinian substituted the uniform term of four years. (C. v. 53. 7.)

Quibusdam et aliis. Such as the *restitutio in integrum*, by which the prætor protected a person under the age of twenty-five years. (See Bk. i. Tit. 23. pr. note.)

6. Item si quis in fraudem creditorum rem suam alicui tradiderit, bonis ejus a creditoribus ex sententia præsidis possessis, permittitur ipsis creditoribus, rescissa traditione, eam rem petere, id est dicere, eam rem traditam non esse et ob id in bonis debitoris mansisse.

6. Again, if a debtor delivers to a third person anything that is his property in order to defraud his creditors, who have been put in possession of his goods by order of the *præses*, the creditors are permitted to rescind the delivery, and bring an action for the thing delivered; that is, they may allege that the thing was not delivered, and that it therefore has continued to be a part of the debtor's goods.

Theophilus tells us that this action, an *actio fictitia in jus concepta*, was called the *actio Pauliana*. The *lex Ælia Sentia* (see Bk. i. Tit. 6) had made enfranchisements in fraud of creditors

void; but the law did not extend to alienations; and the prætor, therefore, when the creditors had taken possession of the effects of the debtor, permitted them to reclaim anything which had been alienated after insolvency and with intent to defraud.

This *actio Pauliana in rem* (says Ortolan) is not spoken of elsewhere in the whole *corpus juris* of Justinian. It must not be confounded with the *actio Pauliana in personam* treated of in the Digest (xxii. 1. 38. pr. and 4), which was given not only in case of alienation, but of every act whereby the debtor had fraudulently diminished his assets. The *intentio* of the *actio in personam* was directed not, as that of the *actio in rem*, which forms the subject of this paragraph, against any one who happened to be the person detaining the thing claimed, but against either (1) the debtor, or (2) persons who, having notice of the fraud, acquired any part of the assets, or (3) persons without notice, who profited by the fraudulent act, in this last case, however, the liability being limited to the extent to which they had profited. (D. xlii. 8. 6. 11; D. xlii. 8. 9.)

7. Item Serviana et quasi Serviana, quæ etiam hypothecaria vocatur, ex ipsius prætoris jurisdictione substantiam capit. Serviana autem experitur quis de rebus coloni, quæ pignoris jure pro mercedibus fundi ei tenentur; quasi Serviana autem qua creditores pignora hypothecasve persequuntur. Inter pignus autem et hypothecam quantum ad actionem hypothecariam nihil interest: nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur. Sed in aliis differentia est: nam pignoris appellatione eam proprie contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit: at eam, quæ sine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus.

7. The *actio Serviana*, and the *actio quasi-Serviana* also called *hypothecaria*, equally take their rise from the prætor's jurisdiction. The *actio Serviana* is brought to get possession of the effects of a farmer which are held as a pledge to secure the rent of the land. The *actio quasi-Serviana* is that by which creditors sue for things pledged or mortgaged to them; and, as regards this action, there is no difference between a pledge and a *hypotheca;* for the two terms are indifferently applied to anything which the debtor and creditor agree shall be bound as security for the debt: but in other points there is a distinction between them. The term pledge is properly applied to a thing which has actually been delivered to a creditor, especially if the thing is a moveable; the term *hypotheca* to anything bound by simple agreement without delivery.

D. xx. 2. 4; D. xx. 1. 17; D. xx. 5. 1; D. xiii. 7. 9. 2.

We have already given a slight sketch of the *jus pignoris*, and the relative position of the creditor and debtor, at the end of the fifth Title of the Second Book. The interest of the creditor was not thought sufficient to support a *vindicatio* if he lost the thing pledged out of his possession, or wished to get the thing subjected to a *hypotheca* into his possession; but a prætorian action enabled him to effect this. The *actio Serviana* mentioned in this paragraph (to be distinguished from that mentioned in GAI. iv. 35) was given to enforce the claim of the landlord to the farming instruments, which, without any special agreement, were considered, in

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certain cases it could be brought only within a year. (C. iv. 18. 2. pr.) The *pecunia* was said to be *constituta* because it was agreed to be paid on a particular day. The *actio receptitia* was an action given against bankers (*argentarii*) who promised to satisfy the demands of a creditor of one of their customers. This creditor was said *recipere diem*, to have a day fixed by the banker for payment of his claim, and hence the action was called *receptitia*. The mere promise of the banker was considered enough to ground an action on, an exception to the ordinary rules of the civil law which must have grown out of the peculiar character of a banker's business. What the civil law confined to bankers only the prætor extended to every one alike; and whenever any one who owed a debt to another or had funds of another in his hand, promised to pay the money owed by or deposited with him on a particular day, the prætor gave the action *de constituta pecunia* to enforce the fulfilment of the promise.

Justinian abolished the *actio receptitia*, and invested the *actio de constituta pecunia* with privileges which had before belonged exclusively to the *actio receptitia;* for he made it in all cases perpetual, and he allowed it to be brought whatever was the nature of the thing promised. (C. iv. 18. 2.)

The pact to pay might be advantageous to the creditor, if it was the debt of another that was agreed to be paid, or if the antecedent obligation was only a natural one, or if the time in which the original debt could be sued on was on the point of expiring.

10. Actionem autem de peculio ideo adversus patrem dominumve comparavit prætor, quia licet ex contractu filiorum servorumve ipso jure non teneantur, æquum tamen esset, peculio tenus, quod veluti patrimonium est filiorum filiarumque, item servorum, condemnari eos.

10. The prætor has introduced actions *de peculio* against fathers and masters, because, although they are not, according to the civil law, bound by the contracts of their children and slaves, yet they ought in equity to be bound to the extent of the *peculium*, which is a kind of patrimony of sons and daughters, and of slaves.

D. xv. 1. 47. 6.

Actions *de peculio* are treated of in par. 4 of next Title.

11. Item si quis postulante adversario juraverit, deberi sibi pecuniam, quam peteret, neque ei solvatur, justissime accommodat ei talem actionem, per quam non illud quæritur, an ei pecunia debeatur, sed an juraverit.

11. Also, if any one, when called upon by his adversary, makes oath that the debt which he sues for is due and unpaid, the prætor most justly grants him an action, in which the inquiry is not whether the debt is due, but whether the oath has been made.

D. xii. 2. 3; D. xii. 2. 5. 2.

Either party might challenge the other to swear to the truth of his statement. This might be done out of court, and if the party challenged took the oath, his statement could no longer be impugned by the person who had challenged him. For instance, if the creditor, being challenged, swore that the debt was due, the

debtor was obliged to pay. The only question, therefore, which could be subsequently referred to a court of justice was whether the oath had or had not been taken, inquiry into which circumstance was made under an *actio in factum* given by the prætor.

12. Pœnales quoque actiones prætor bene multas ex sua jurisdictione introduxit: veluti adversus eum, qui quid ex albo ejus corrupisset: et in eum, qui patronum vel parentem in jus vocasset, cum id non impetrasset: item adversus eum, qui vi exemerit eum, qui in jus vocaretur, cujusve dolo alius exemerit: et alias innumerabiles.

12. The prætor has also introduced very many penal actions by virtue of his jurisdiction. As, for instance, against a person who has tampered with the prætor's *album;* against those who summon patron or ascendant without obtaining previous permission; against those who carry away by force any one summoned to appear before a magistrate, or fraudulently induce a third person to carry him off; and very many other actions.

GAI. iv. 46.

The *album* was the tablet suspended in the forum, containing the ordinances of the prætor. Any attempt to injure or deface it was punished by an action *de albo corrupto.* (D. ii. 1. 7. pr.) *In eum, qui patronum,* &c.; see Tit. 16. 3.

The *actio de in jus vocato vi exempto* was given against a person who rescued with violence any one who, after disobeying a notice to appear *in jure,* was being forcibly conveyed before the magistrate. The penalty was the amount at which the plaintiff estimated his claim in the action he had commenced against the person rescued, while this person rescued remained still liable to the action he had been summoned to answer. The actions under all the heads mentioned in this paragraph were *in factum.* (D. ii. 7. 5. 1.)

13. Præjudiciales actiones in rem esse videntur, quales sunt, per quas quæritur, an aliquis liber vel an libertus sit, vel de partu agnoscendo. Ex quibus fere una illa legitimam causam habet, per quam quæritur, an aliquis liber sit: ceteræ ex ipsius prætoris jurisdictione substantiam capiunt.

13. Pre-judicial actions seem to be real actions; such are those by which it is inquired whether a man is born free, or has been made free, or whether he is the offspring of his reputed father. But of these, that alone by which it is inquired whether a man is free, belongs to the civil law. The others spring from the prætor's jurisdiction.

GAI. iv. 44; C. viii. 47. 9.

The object of a *præjudicialis actio* was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings. (See Introd. sec. 104.) Such actions differ from actions *in rem,* because in an *actio præjudicialis* no one is condemned, only the fact is ascertained; but they are said in the text to resemble actions *in rem,* because they were not brought on any obligation, and because in the *intentio,* which indeed composed the whole formula in this case, no mention was made of any particular person against whom the action was directed.

Questions of *status,* such as those of paternity, filiation, pa-

tronage, and the like, were most commonly the subjects of *actiones præjudiciales*, but were by no means the only ones. We hear of others, such as *quanta dos sit* (GAI. iv. 44); *an ea res de qua agitur major sit centum sestertiis* (PAUL. *Sent.* v. 9. 1); *an bona jure venierint* (D. xlii. 5. 30).

The *liberalis causa*, the suit in which the *status* of a supposed slave was ascertained, was originally nothing else but a *vindicatio*. The person called the *assertor libertatis* claimed him, and the master of the slave defended his possession. If the decision was in favour of the *assertor*, it was still open to another person to attempt to prove that the subject of the suit was really a slave; if the decision was in favour of the master, another *assertor* could bring a fresh suit; but there could only be three *assertores* in all. If the supposed slave was thrice adjudged a slave, his *status* could be no further questioned. Justinian entirely altered the action, by allowing the slave himself to claim his liberty, and making the first decision final. (C. vii. 17. 1.)

14. Sic itaque discretis actionibus, certum est, non posse actorem rem suam ita ab aliquo petere 'si paret eum dare oportere': nec enim quod actoris est, id ei dari oportet, quia scilicet dari cuiquam id intellegitur, quod ita datur, ut ejus fiat, nec res, quæ jam actoris est, magis ejus fieri potest. Plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra pœnam dupli aut quadrupli rei recipiendæ nomine fures etiam hac actione teneantur 'si paret eos dare oportere,' quamvis sit adversus eos etiam hæc in rem actio, per quam rem suam quis esse petit.

14. Actions being thus divided, it is certain that a plaintiff cannot sue for his own property by such a formula as this, 'If it appears that the defendant ought to give'. For it is not a duty to give the plaintiff that which is his own. To give a thing is to transfer the property in it, and that which is already the property of the plaintiff cannot belong to him more than it does already. However, to show detestation for thieves, and to make them liable to a greater number of actions, it has been determined, that besides the penalty of double or quadruple the amount taken, they may, for the recovery of the thing taken, be subjected to the action, 'If it appear that they ought to give'; although the party injured may also bring the real action against them, by which the plaintiff demands the thing as proprietor.

GAI. iv. 4.

We have already seen (Tit. 1. 19) that the plaintiff might benefit by being allowed to bring a personal instead of a real action, as the things taken might have perished. But why should the *condictio* be so shaped as described in the text? The reason was this: the plaintiff, by being allowed to frame his action with the word *dare*, which was technically wrong, as this implied to transfer the full ownership, whereas the plaintiff remained the owner of the thing stolen, had the advantage, under the formulary system, of recovering the *sponsio pœnalis* (GAI. iv. 171), or wager of one-third of the value of the thing, which was added to a *condictio certi*. (See Introd. sec. 99.)

15. Appellamus autem in rem quidem actiones vindicationes: in personam vero actiones, quibus dare facere oportere intenditur, condictiones. Condicere enim est denuntiare prisca lingua: nunc vero abusive dicimus condictionem actionem in personam, qua actor intendit, dari sibi oportere: nulla enim hoc tempore eo nomine denuntiatio fit.

15. Real actions are called vindications; and personal actions, in which it is maintained that something ought to be done or given, are called condictions: for *condicere*, in old language, meant the same as *denuntiare;* and it is improperly that condiction is now used as the name of the personal action, by which the plaintiff contends that something ought to be given to him, for there is no *denuntiatio* now actually in use.

GAI. iv. 5, 18.

Gaius says, '*actor adversario denuntiabat, ut ad judicem capiendum die xxx. adesset*' (iv. 18). Thus the proper meaning of *condictio* is the appointing of a day.

16. Sequens illa divisio est, quod quædam actiones rei persequendæ gratia comparatæ sunt, quædam pœnæ persequendæ, quædam mixtæ sunt.

16. Actions may be next divided into actions given to recover the thing, actions given to recover a penalty, and mixed actions.

GAI. iv. 6.

We now come to the third division of actions, that, namely, according to the object for which they were brought; they were divided under this head into three classes—those in which it was sought to get a thing, *rei persecutoriæ*, including all real actions and all personal actions, except those in which something beyond the simple value was recovered, those in which it was sought to enforce a penalty, and those (*mixtæ*) in which both these objects were united.

17. Rei persequendæ causa comparatæ sunt omnes in rem actiones. Earum vero actionum, quæ in personam sunt, hæ quidem, quæ ex contractu nascuntur, fere omnes rei persequendæ causa comparatæ videntur: veluti quibus mutuam pecuniam vel in stipulatum deductam petit actor, item commodati, depositi, mandati, pro socio, ex empto, vendito, locato, conducto. Plane si depositi agatur eo nomine, quod tumultus, incendii, ruinæ, naufragii causa depositum sit, in duplum actionem prætor reddit, si modo cum ipso, apud quem depositum sit, aut cum herede ejus ex dolo ipsius agitur: quo casu mixta est actio.

17. For the recovery of the thing are given all real actions; and of personal actions almost all those which arise from contract, as the action for a sum lent or stipulated for, and the actions proper to *commodatum*, deposit, mandate, partnership, sale, or letting on hire. But, no doubt, when the action on a deposit is brought for a thing deposited by reason of a riot, a fire, the fall of a building, or a shipwreck, the prætor gives the action for the double of the value of the thing deposited, provided the suit is brought against the depositary himself, or against his heir, if personally guilty of *dolus malus*, in which case the action is mixed.

GAI. iv. 7; D. xvi. 3. 1. 1-4; D. xvi. 3. 18.

The action against a fraudulent depositary was not *in duplum*, unless the depositor had been forced by fire, shipwreck, the fall of a building, or other sudden calamity, to make the deposit. This form of *depositum* was called *miserabile*. If, without being so

forced, he had selected the depositary, then the action was only for the single value. It was his own fault not to have chosen an honester man. (See Bk. iii. Tit. 14. 3.)

18. Ex maleficiis vero proditæ actiones aliæ tantum pœnæ persequendæ causa comparatæ sunt, aliæ tam pœnæ quam rei persequendæ et ob id mixtæ sunt. Pœnam tantum persequitur quis actione furti; sive enim manifesti agatur quadrupli sive nec manifesti dupli, de sola pœna agitur: nam ipsam rem propria actione persequitur quis, id est suam esse petens, sive fur ipse eam rem possideat, sive alius quilibet: eo amplius adversus furem etiam condictio est rei.

18. Actions arising from a delict are either for the penalty only, or both for the thing and the penalty, which makes them mixed. But, in an action of theft, nothing more is sued for than the penalty; whether, as in manifest theft, the quadruple, or, in theft not manifest, the double, is sued for. The owner recovers the thing itself by a separate action, by claiming it as proprietor, whether it is in the possession of a thief or of any one else. He may also bring against the thief a condiction for the thing.

GAI. iv. 8; D. xiii. 1. 7. 1.

Persons who suffered from crimes had a private action against the wrongdoer for compensation, quite apart from, and independent of, the prosecution of the offender for his outrage on the laws of society. There was, indeed, something more than an exact compensation enforced by the private actions; for, by way of penalty, the defendant had often to pay two, three, or four times the amount of loss actually sustained, and also to give back the thing or its value; but still this penalty was given as a punishment for the injury to the individual, and not as a punishment for the infraction of public law.

19. Vi autem bonorum raptorum actio mixta est, quia in quadruplo rei persecutio continetur, pœna autem tripli est. Sed et legis Aquiliæ actio de damno mixta est, non solum si adversus infitiantem in duplum agatur, sed interdum et si in simplum quisque agit. Veluti si quis hominem claudum aut luscum occiderit, qui in eo anno integer et magni pretii fuerit; tanti enim damnatur, quanti is homo in eo anno plurimi fuerit, secundum jam traditam divisionem. Item mixta est actio contra eos, qui relicta sacrosanctis ecclesiis vel aliis venerabilibus locis legati vel fideicommissi nomine dare distulerint usque adeo, ut etiam in judicium vocarentur: tunc etenim et ipsam rem vel pecuniam, quæ relicta est, dare compelluntur et aliud tantum pro pœna, et ideo in duplum ejus fit condemnatio.

19. An action for goods taken by force is a mixed action, because the thing taken is included under the quadruple value to be recovered by the action; and thus the penalty is but triple. The action introduced by the *lex Aquilia*, for wrongful damage, is also a mixed action; not only when brought for double value against a man denying liability, but sometimes when the action is only for the single value; for instance, if a man has killed a slave, who at the time of his death was lame, or wanted an eye, but within the year, previous to his decease, was free from any defect, and of great value, here, according to the distinction previously laid down, the wrongdoer is condemned to pay an amount representing the greatest value of the slave within the year. The action is also mixed which is brought against those who have delayed the payment of a legacy, or *fideicommissum*, left to our holy churches, or other sacred places, until at last they have been summoned before a magistrate; for

then they are compelled to give the thing, or to pay the money left by the deceased, and in addition an equivalent thing or an equal sum, by way of penalty; and thus they are condemned in a double amount.

C. ix. 33. 1; D. ix. 2. 23. 3-6; C. i. 3. 46. pr. and 7.

Interdum et si in simplum. An action could be brought *in simplum* under the *lex Aquilia*, if the object of the action was not to determine whether the defendant had done the injury, but to fix the sum which would be the proper compensation for it. It could not be brought *in simplum* to determine the fact of the defendant having done the injury: for if he denied it, the action was *in duplum;* if he confessed it, there was no need of an action to prove what he confessed.

Sacrosanctis ecclesiis. The punishment had formerly been enforced in case of all legacies in which specific things had been given *per damnationem.* (See Bk. iii. Tit. 27. 7.)

Dare distulerint. Formerly the punishment had only been inflicted in case of an absolute refusal of the legacy. (C. i. 3. 46. 7.)

The use in this paragraph of the word *mixtæ* in the sense of 'brought at once to recover a thing and to enforce a penalty,' seems to have suggested the reference in the next paragraph to actions which were *mixtæ* in a very different sense, viz. 'both real and personal'.

20. Quædam actiones mixtam causam optinere videntur tam in rem quam in personam. Qualis est familiæ erciscundæ actio, quæ competit coheredibus de dividenda hereditate: item communi dividundo, quæ inter eos redditur, inter quos aliquid commune ex quacumque causa est, ut id dividatur: item finium regundorum, quæ inter eos agitur, qui confines agros habent. In quibus tribus judiciis permittitur judici rem alicui ex litigatoribus ex bono et æquo adjudicare et, si unius pars prægravari videbitur, eum invicem certa pecunia alteri condemnare.

20. Some actions are also mixed, as being both real and personal; as, for instance, the action *familiæ erciscundæ*, brought between co-heirs for the partition of the inheritance; the action *de communi dividundo*, between partners for the division of things held for any reason in common; also, the action *finium regundorum*, between owners of contiguous estates. And, in these three actions, the judge, following the rules of equity, may give the property to any of the parties to the suit, and then condemn him, if he seems to have an undue advantage, to pay the other a certain sum of money.

D. x. 1. 2. 1; D. x. 1. 3; D. x. 2. 55.

These actions, though entirely personal, as being founded on obligations and brought against particular persons, are here said to seem in one aspect like real actions, because they involved an *adjudicatio.* Particular things were adjudged and given over to the parties. Even here, however, the analogy to real actions was not very complete, as real actions were always brought for some definite thing, ascertainable before the action was brought; but,

except in the case of an indivisible thing or one which it was not expedient to divide (the case referred to in the last clause of the paragraph), the thing to be adjudged was only ascertained by the action.

As to the formula in these actions, see Introd. sec. 103. In these actions no distinction can properly be made of plaintiff and defendant. Ulpian says, '*Mixtæ sunt actiones, in quibus uterque actor est*'. (D. xliv. 7. 37. 1.) The judge discharged the function assigned him equally for the benefit of all persons interested in the subject-matter of the action. (See Tit. 17. 4-7.)

21. Omnes autem actiones vel in simplum conceptæ sunt vel in duplum vel in triplum vel in quadruplum: ulterius autem nulla actio extenditur.

21. All actions are for the single, double, triple, or quadruple value; beyond that no action extends.

D. ii. 8. 3.

We have now the fourth division of actions, that, namely, according to the amount of the condemnation.

In actions which were *in duplum*, *in triplum*, or *in quadruplum conceptæ*, the *intentio* only contained an estimate of the single value, the amount of actual loss, and then in the *condemnatio* this was doubled, tripled, or quadrupled, as the case might be; the word *conceptæ*, therefore, which properly refers to the *intentio*, is not very strictly used.

22. In simplum agitur veluti ex stipulatione, ex mutui datione, ex empto, vendito, locato, conducto, mandato et denique ex aliis compluribus causis.

22. The simple value is sued for; as, for example, in case of a stipulation, a contract of *mutuum*, a sale, a letting on hire, a mandate, and in numberless other cases.

If a person stipulated that in a certain case his debtor should give him double or triple of the value of the sum owed, the action brought to enforce the stipulation would still be *in simplum concepta*. It would be the agreement, and not the action, which would double or triple the sum to be paid.

23. In duplum agimus veluti furti nec manifesti, damni injuriæ ex lege Aquilia, depositi ex quibusdam casibus: item servi corrupti, quæ competit in eum, cujus hortatu consiliove servus alienus fugerit aut contumax adversus dominum factus est aut luxuriose vivere cœperit aut denique quolibet modo deterior factus sit (in qua actione etiam earum rerum, quas fugiendo servus abstulit, æstimatio deducitur): item ex legato, quod venerabilibus locis relictum est, secundum ea, quæ supra diximus.

23. The double value is sued for; as, for example, in an action of theft not manifest, of wrongful injury under the *lex Aquilia*, and, in certain cases, in an action of deposit. Also in an action on account of the corruption of a slave brought against him by whose advice or instigation the slave has fled from his master, has grown disobedient towards him, become dissolute in his habits, or been made in any manner worse; and, in this action, an estimate is also to be made of whatever things the slave has stolen from his master at his flight. An action also for the detention of a legacy, left to a sacred

place, is brought for double value, as we have before stated.

GAI. iii. 190; GAI. iv. 9, 171; D. xvi. 3. 1. 1; D. xi. 3. 1. pr.; C. i. 3. 46. 7.

Depositi ex quibusdam casibus, i.e. when made under the pressure of a sudden calamity. (See note on par. 17.)

24. Tripli vero, cum quidam majorem veræ æstimationis quantitatem in libello conventionis inseruit, ut ex hac causa viatores, id est executores litium, ampliorem summam sportularum nomine exigerent: tunc enim quod propter eorum causam damnum passus fuerit reus, id triplum ab actore consequetur, ut in hoc triplo et simplum, in quo damnum passus est, connumeretur. Quod nostra constitutio induxit, quæ in nostro codice fulget, ex qua dubio procul est ex lege condicticiam emanare.

24. The triple value is sued for when any person inserts in his statement of demand a greater sum than is due to him, so that the *viatores*, that is, the officers of suits, exact a larger sum as their fee. In this case the defendant may obtain from the plaintiff the triple value of the loss he has sustained by giving the fee, but the amount which, by being overcharged, he disbursed is counted as one of the three sums in the triple value. This a constitution inserted in our code has established, on which constitution, without doubt, a statutory condiction may be grounded.

C. iii. 10. 2.

In the old law there had been other actions *in triplum*, as those *furti concepti* and *furti oblati*. (GAI. iii. 191; see Tit. 1. 4 of this Book.) The action, of which Justinian speaks in this paragraph, had been substituted by him for the penalty of entirely losing all right of action, to which a plaintiff who sued for more than was due to him had been liable. (GAI. iv. 53.)

The *libellus conventionis*, in the system of civil process obtaining in the Lower Empire, was the notification of an action and its grounds delivered by a bailiff of the court (*viator, executor*) to a defendant, who, on the receipt of it, had to give security for his appearance before the *judex*. It thus, in the *extraordinaria judicia*, replaced the old *vocatio in jus*. *Condictio ex lege* is literally a 'condiction under a statute'. (See Introd. sec. 111.)

25. Quadrupli veluti furti manifesti, item de eo, quod metus causa factum sit, deque ea pecunia, quæ in hoc data sit, ut is, cui datur, calumniæ causa negotium alicui faceret vel non faceret: item ex lege condicticia a nostra constitutione oritur, in quadruplum condemnationem imponens his exsecutoribus litium, qui contra nostræ constitutionis normam a reis quidquam exegerint.

25. The quadruple value is sued for; as, for example, in an action for manifest theft, in an action *quod metus causa*, and an action relating to money given to any one to set on foot, or to desist from, a vexatious suit. The statutory condiction is also for the quadruple value, which is established in our constitution against those officers of suits who demand anything from the defendant, contrary to the regulations of the constitution.

GAI. iii. 189; D. iv. 2. 14. 1; D. iii. 6. 1. pr.; C. iii. 2. 4.

De ea pecunia quæ datur. Titius is bribed by some one to institute a vexatious suit, or he threatens to bring a vexatious suit,

and the person he threatens pays him not to bring it. In either case an action *in quadruplum* lies against him.

26. Sed furti quidem nec manifesti actio et servi corrupti a ceteris, de quibus simul locuti sumus, eo differt, quod hæ actiones omnimodo dupli sunt: at illæ, id est damni injuriæ ex lege Aquilia et interdum depositi, infitiatione duplicantur, in confitentem autem in simplum dantur: sed illa, quæ de his competit, quæ relicta venerabilibus locis sunt, non solum infitiatione duplicatur, sed et si distulerit relicti solutionem, usque quo jussu magistratuum nostrorum conveniatur; in confitentem vero et antequam jussu magistratuum conveniatur solventem simpli redditur.

26. But an action of theft not manifest, and an action on account of a slave corrupted, differ from the others, which we have placed under the same head, in that they are always brought for double the value; but the others, that is, the action given by the *lex Aquilia* for a wrongful injury, and the action of deposit under pressure, are brought for the double value in case of denial; but if the defendant confesses, the single value only can be recovered. In actions brought for things given to sacred places, double is recovered, not only on the denial of the defendant, but also on payment being delayed until a magistrate orders an action to be brought; but it is the single value only that can be recovered, if the debt is acknowledged, and paid before such an order is given.

GAI. iv. 9. 171, 173; C. i. 3. 46. 7.

27. Item actio de eo, quod metus causa factum sit, a ceteris, de quibus simul locuti sumus, eo differt, quod ejus natura tacite continetur, ut, qui judicis jussu ipsam rem actori restituat, absolvatur. Quod in ceteris casibus non ita est, sed omnimodo quisque in quadruplum condemnatur, quod est et in furti manifesti actione.

27. The action *quod metus causa* differs also from the other actions included under the same head, because it is tacitly implied in the nature of this action, that a defendant, who, in obedience to the command of the judge, restores the things taken, ought to be acquitted; in all the other actions, on the contrary, the defendant is always condemned to pay the fourfold value, as, for instance, in the action of manifest theft.

D. iv. 2. 14. 1, 4.

The *actio quod metus causa* was given to a person who had, while under constraint from the fear of actual or threatened violence, alienated anything, created real rights, or entered into an obligation. It could be brought against any one who profited by what had been done. (D. iv. 2. 14. 3.) The action was, as the text informs us, *arbitraria*. (See Introd. sec. 106.)

28. Actionum autem quædam bonæ fidei sunt, quædam stricti juris. Bonæ fidei sunt hæ: ex empto, vendito, locato, conducto, negotiorum gestorum, mandati, depositi, pro socio, tutelæ, commodati, pigneraticia, familiæ erciscundæ, communi dividundo, præscriptis verbis, quæ de æstimato proponitur, et ea, quæ ex permutatione competit, et hereditatis petitio. Quamvis enim usque adhuc incertum erat, sive inter

28. Again, some actions are *bonæ fidei*, some are *stricti juris*. Of those *bonæ fidei* there are the following:—the actions *empti* and *venditi*, *locati* and *conducti*, *negotiorum gestorum;* those brought on a mandate, deposit, partnership, tutelage, loan, or pledge; the action *familiæ erciscundæ;* that *communi dividundo;* the action *præscriptis verbis*, arising from a commission to sell at a fixed price, or an exchange; and the demand of an in-

bonæ fidei judicia connumeranda sit sive non, nostra tamen constitutio aperte eam esse bonæ fidei disposuit.

heritance. For although it was, till recently, doubtful whether this last action should be included among those *bonæ fidei*, our constitution has clearly decided that it is to be included among them.

GAI. iv. 62; C. iii. 31. 12. 3.

We here enter on the fifth division of actions, that, namely, according to the powers given to the judge, and according to which they are divided into *actiones bonæ fidei, actiones stricti juris* and *actiones arbitrariæ.*

In actions *bonæ fidei*, the words *ex bona fide*, or some equivalent expression, were permitted to be added to the formula, so that the *intentio*, which was always *incerta*, ran, *quicquid dare*, or *facere*, or *præstare oportet ex bona fide.* The actions in which this was permitted were all prætorian. Justinian here gives a list of them; and probably, though not quite certainly, the list is meant to be a complete one. The principal effects of this addition to the formula were:—(1) That all circumstances tending to show *dolus malus* were taken into consideration, without an exception *doli mali* being inserted. (D. xxx. 84. 5.) (2) Every assistance which the consideration of customs and common use could give to the determination of the particular question was permitted to affect the decision of the judge. (D. xxi. 1. 31. 20.) (3 The judge would notice any counter claims which the defendant might have arising out of the same set of circumstances which gave rise to the action of the plaintiff (GAI. iv. 63), and would provide for future contingencies, as, e.g., in an action *pro socio*, he met the case of one partner having taken on himself liabilities not as yet enforceable. (D. xvii. 2. 38. pr.) (4) And, lastly, interest was due on the thing withheld from the time it ought to have been given. (D. xxii. 1. 32. 2.)

In the actions *stricti juris*, the judge was obliged to adhere strictly to the principles of the civil law. *Dolus malus*, or counter claims, could not be taken into consideration unless exceptions were inserted bringing them before the notice of the judge. And interest could not generally be claimed from before the time of the *litis contestatio*, except by special stipulation. (D. xii. 1. 31.) It was the actions derived from the *jus civile*, i.e. real actions and condictions, that were *stricti juris*. That a real action should, as in the case of the *petitio hereditatis*, be *bonæ fidei*, was quite an exception. But the *petitio hereditatis* had characteristics which allied it with personal actions, *habet præstationes quasdam personales.* (D. v. 3. 25. 18.) It could only be brought against those who possessed an inheritance (1) *pro herede*, i.e. as heir or *bonorum possessor*, or (2) *pro possessore. Pro possessore possidet prædo qui interrogatus cur possideat, responsurus sit quia possideo*, i.e. a possessor who does not pretend to justify his possession by any legal title. (D. v. 3. 11 and 12.) And not only was

the *petitio hereditatis* thus personal in the sense of being limited to two classes of persons, but it had some of the consequences of a personal action. By it the plaintiff could recover from the possessor moneys he had derived from the inheritance, and it could be brought against debtors of the deceased to make them pay what they owed to the inheritance in case these debtors claimed to retain their debts as being the right heirs. (D. v. 3. 13. 15; D. v. 3. 42.) The jurists had been divided on the point whether in a *petitio hereditatis* cognisance could be taken of *dolus malus* without an *exceptio*. Justinian decided that it could, the action being treated as one *bonæ fidei*.

Actiones arbitrariæ are treated of in paragr. 31.

An action *præscriptis verbis*, otherwise *in factum præscriptis verbis*, or *civilis in factum*, was, as we have elsewhere said, an action in which at the head of the formula were placed words stating the facts giving rise to a contract which did not come under any of the heads of contracts bearing a particular name. Of these actions, which were always *bonæ fidei* and *in jus conceptæ*, the two mentioned in the text are only examples. In the contract *permutatio*, each party made a contract *re*, i.e. by depositing the thing bartered with the other; but the thing given was not given as a *mutuum*, a *commodatum*, a *depositum*, or a *pignus*, and therefore the circumstances had to be stated specially. The action *de æstimato* was given when a thing was entrusted to another to sell for a certain sum; the agent being permitted to retain all he received above that given, and to give back the thing if he could not obtain the price fixed. This was not precisely a *locatio*, a *societas*, or a *mandatum*, and therefore the action was given in the form of one *præscriptis verbis*. (See Bk. iii. Tit. 13. 2. note 4.)

29. Fuerat antea et rei uxoriæ actio ex bonæ fidei judiciis: sed cum, pleniorem esse ex stipulatu actionem invenientes, omne jus, quod res uxoria ante habebat, cum multis divisionibus in ex stipulatu actionem, quæ de dotibus exigendis proponitur, transtulimus, merito rei uxoriæ actione sublata, ex stipulatu, quæ pro ea introducta est, naturam bonæ fidei judicii tantum in exactione dotis meruit, ut bonæ fidei sit. Sed et tacitam ei dedimus hypothecam: præferri autem aliis creditoribus in hypothecis tunc censuimus, cum ipsa mulier de dote sua experiatur, cujus solius providentia hoc induximus.

29. Formerly, there was the action *rei uxoriæ*, which was included among the actions *bonæ fidei*; but finding the action *ex stipulatu* to be more advantageous, we have transferred, but with many distinctions, to the action *ex stipulatu*, when given for the recovery of marriage portions, all the effects before attaching to the action *rei uxoriæ*; the *actio rei uxoriæ* being then reasonably done away with, the action *ex stipulatu*, by which it is replaced, naturally assumed the character of an action *bonæ fidei*, but assumed it only when brought for the recovery of a marriage portion. We have also given the wife an implied mortgage, but when we prefer her to mortgagees, we do so only whenever she herself sues for her marriage portion. For it is to her personally that we grant the privilege.

D. iv. 5. 8; C. v. 13; C. viii. 18. 12. 1.

In order to enforce the restitution of a marriage portion after the dissolution of the marriage, the *actio rei uxoriæ* was given; but sometimes the wife or other person entitled (Bk. ii. Tit. 7. 3 note), not content with the remedy, stipulated with the husband for the restitution, and thus secured the power of bringing an action *ex stipulatu*.

In the *actio rei uxoriæ*, which was an action *bonæ fidei*, the husband could, for different reasons, make certain deductions in his restitution of the *dos*. He had three years in which to make restitution by thirds of all things *quæ numero, pondere, mensurave constant;* he could oppose to the action the *beneficium competentiæ*, that is, he was only condemned to pay *quantum facere potest;* and he could deduct the useful as well as the necessary expenses he had incurred in managing the dotal property. (See paragr. 37.) The wife could not transmit the action to her heirs, and if her husband was deceased, and she had benefited by his testament, she could not both accept the gift under the testament, and also ask for the restitution of her portion, but was obliged to abandon either the one advantage or the other. (ULP. *Reg.* 6. 6. *et seq.*)

None of these drawbacks attended the action *ex stipulatu*. There could be no deductions, no delay in payment, no regard to the husband's power to pay. The action passed to the heirs of the wife, and she could take, in addition, anything given her by her husband's testament.

Justinian united the two actions into one. However the *dos* might have been given, and whether there had really been any stipulation to restore it, a *tacita stipulatio* was, in every case, to be supposed. The *actio rei uxoriæ* was to be abolished, and all actions for the restitution of a marriage portion to be brought *ex stipulatu.* But then, this action was treated as one *bonæ fidei*, and produced most of the advantages which the husband had enjoyed under the *actio rei uxoriæ*. He had a year in which to restore all moveables; he could claim the *beneficium competentiæ*, and might deduct the necessary expenses he had been put to. (See paragr. 37.) Lastly, in order to make the position of the wife more secure, Justinian gave her an implied mortgage on the effects of her husband, taking priority over all other incumbrances —a privilege, however, personal to herself. (C. v. 13. 1.)

30. In bonæ fidei autem judiciis libera potestas permitti videtur judici ex bono et æquo æstimandi, quantum actori restitui debeat. In quo et illud continetur, ut, si quid invicem actorem præstare oporteat, eo compensato, in reliquum is, cum quo actum est, condemnari debeat. Sed et in strictis judiciis ex rescripto divi Marci opposita doli mali exceptione compensatio inducebatur. Sed nostra constitutio eas compensa-

30. In all actions *bonæ fidei* full power is given to the judge to determine, according to the rules of equity, how much ought to be restored to the plaintiff; whence it follows that when the plaintiff also is found to be indebted to the defendant, the debtor ought to be allowed to set off the sum due to him, and to be condemned only to pay the difference. Even in actions *stricti juris*, a rescript of the Emperor Marcus permitted a set-off to be claimed, by

tiones, quæ jure aperto nituntur, latius introduxit, ut actiones ipso jure minuant sive in rem sive personales sive alias quascumque, excepta sola depositi actione, cui aliquid compensationis nomine opponi satis impium esse credidimus, ne sub prætextu compensationis depositarum rerum quis exactione defraudetur.

opposing the exception of fraud; but our constitution, when the debt due to the defendant is evident, has given a greater latitude to claims of set-off; for now actions, real or personal, or of whatever kind, are *ipso jure* reduced by the claim, with the exception only of the action of deposit, against which we have judged it highly improper to permit any claim of set-off to be made, lest under this pretence any one should be fraudulently prevented from recovering the thing deposited.

Gai. iv. 61; C. iv. 31. 14. pr. and 1; C. iv. 34. 11.

The subject of *compensatio* will be treated of more fully under paragr. 39.

31. Præterea quasdam actiones arbitrarias, id est ex arbitrio judicis pendentes, appellamus, in quibus nisi arbitrio judicis is, cum quo agitur, actori satisfaciat, veluti rem restituat vel exhibeat vel solvat vel ex noxali causa servum dedat, condemnari debeat. Sed istæ actiones tam in rem quam in personam inveniuntur. In rem veluti Publiciana, Serviana de rebus coloni, quasi Serviana, quæ etiam hypothecaria vocatur: in personam veluti quibus de eo agitur, quod aut metus causa aut dolo malo factum est, item qua id, quod certo loco promissum est, petitur. Ad exhibendum quoque actio ex arbitrio judicis pendet. In his enim actionibus et ceteris similibus permittitur judici ex bono et æquo secundum cujusque rei, de qua actum est, naturam æstimare, quemadmodum actori satisfieri oporteat.

31. Some actions, again, are called arbitrary, as depending upon the *arbitrium* of the judge. In these, if the defendant does not, on the order of the judge, give the satisfaction awarded by the judge, and either restore, exhibit, or pay the thing, or give up a slave that has committed an injury, he ought to be condemned. Of these arbitrary actions some are real and some personal: real, as the actions *Publiciana, Serviana* as to the property of a farmer, and *quasi-Serviana*, also called *hypothecaria;* personal, as those by which a suit is commenced on account of something done through fear or fraud, and that by which something is sought which was promised to be paid at a particular place. The action *ad exhibendum* also depends on the *arbitrium* of the judge. In these actions, and others of a like nature, the judge may determine, according to the principles of equity and the circumstances of the particular case, the satisfaction which the plaintiff ought to receive.

D. vi. 1. 18; D. iv. 2. 14. 4; D. xiii. 4. 4. 1; D. xx. 1. 16. 3; D. iv. 3. 18.

In the *actiones arbitrariæ* the judge was instructed only to condemn the defendant in a sum of money, if he did not satisfy the demand of the plaintiff, supposing that demand was well founded. When, therefore, the judge had ascertained the validity of the plaintiff's claim, he issued an order (*arbitrium*) to the defendant, and at the same time condemned him to pay, in case of his refusal, a sum proportionate to the value of what was claimed, *quanti ea res erit*. This was fixed, if the defendant, when ordered to restore a thing, had fraudulently put it out of his power to restore it, by the plaintiff himself, who stated on his oath (D. xii. 3. 5) the amount he considered fairly due to him as compensation; otherwise the *judex* fixed the amount according to the

circumstances of the case; and, at any rate in the time of Ulpian, the *manus militaris* was employed, by the direction of the judge, to put the plaintiff in possession, when the defendant had the thing in his possession and would not give it up. (D. vi. 1. 68.)

Actions *in rem* were enforced by being made *arbitrariæ*, and all actions *in rem* were so enforced. (See Tit. 17. 2.) In real actions the satisfaction ordered by the judge was to restore the thing. In the *actio Serviana* and the *actio quasi-Serviana*, the *arbitrium* was alternative, and the defendant was ordered either to pay the debt or to give up the thing pledged, and in default was condemned to the amount of the value of the thing pledged. (D. xx. 1. 16. 3.) It is to this case that the words '*vel solvat*' in the text refer. When the thing claimed was restored, the *condemnatio* might still be made available for the *fructus*. (D. vi. 1. 68.) Among personal actions, those *quod metus causa, de dolo malo*, and *ad exhibendum* were *arbitrariæ*, because they were brought virtually to have something restored or exhibited. The action *de eo quod certo loco promissum est* was made *arbitraria*, for the peculiar reason mentioned below.

With respect to the *actio quod metus causa*, see paragr. 25 and 27. The *actio de dolo malo* was given to avoid the consequences of a *dolus malus*, but only when there was no other means of avoiding them (D. iv. 3. 1. 1); it was *in simplum;* it subjected the defendant, if condemned, to infamy, and had to be brought within a year. (D. iv. 3. 29.)

As will be found from Tit. 12. 2, in every action the defendant was to be absolved if, before sentence was given, he satisfied the demands of the plaintiff.

Qua id, quod certo loco promissum est, petitur. When a contract was made in which it was agreed that payment should be made at a particular place, the creditor could not demand payment anywhere else. If he did, he asked for more than was his due, and was subject to the consequences of a *plus-petitio*. (See paragr. 33.) Supposing, indeed, the action brought on the obligation was one *bonæ fidei*, or had an *intentio incerta*, as being for an undetermined object, then, as the judge would take into account all the circumstances of the case, and allow the defendant the benefit of whatever difference being sued in a wrong place could be supposed to make to him, the consequence of this *plus-petitio* would be immaterial. But if the action was *stricti juris* and for a thing certain, the plaintiff could not have brought it elsewhere than in the place named without incurring the consequences of a *plus-petitio*, had not the prætor come to his relief and given him the *actio arbitraria* mentioned in the text. By this action the creditor was allowed to sue in a place other than that agreed upon, but the prætor compensated the debtor by giving him an advantage. The action was made *arbitraria*, and the debtor was ordered to pay what the creditor claimed, or to give security that it would be paid in the place where due. If he did not do this, then in the *condemnatio* the *judex* fixed an amount in which the

advantage it might have been to the debtor to have paid in the particular place was taken into consideration. (See paragr. 33.) The prætor, however, perhaps only allowed the creditor to take advantage of this action if the defendant absented himself from the place where the payment ought to have been made (D. xiii. 4. 1), and then the creditor could bring this action either at Rome or in any place where the defendant had a domicile, or in any place where the defendant consented to appear. (D. v. 1. 19. 4.)

32. Curare autem debet judex, ut omnimodo, quantum possibile ei sit, certæ pecuniæ vel rei sententiam ferat, etiam si de incerta quantitate apud eum actum est.

32. A judge ought, as much as possible, to take care that his sentence awards a thing or sum certain, even though the claim submitted to him may have been for an uncertain quantity.

GAI. iv. 48, 52; C. vii. 4. 17.

Certæ pecuniæ vel rei. Before the formulary system the judgment might be either to give a thing or to pay a sum of money. Under the formulary system the *condemnatio* was always to pay a sum of money. (GAI. iv. 48.) Under the system of *judicia extraordinaria* a return was made to the old law, and the *condemnatio* might be not only for a certain sum of money, but also for any other definite thing, that thus the object of the demand might be directly obtained.

33. Si quis agens in intentione sua plus complexus fuerit, quam ad eum pertinet, causa cadebat, id est rem amittebat, nec facile in integrum a prætore restituebatur, nisi minor erat viginti quinque annis. Huic enim sicut in aliis causis causa cognita succurrebatur, si lapsus juventute fuerat, ita et in hac causa succurri solitum erat. Sane si tam magna causa justi erroris interveniebat, ut etiam constantissimus quisque labi posset, etiam majori viginti quinque annis succurrebatur: veluti si quis totum legatum petierit, post deinde prolati fuerint codicilli, quibus aut pars legati adempta sit aut quibusdam aliis legata data sint, quæ efficiebant, ut plus petisse videretur petitor quam dodrantem, ad quem ideo lege Falcidia legata minuebantur. Plus autem quattuor modis petitur: re, tempore, loco, causa. Re: veluti si quis pro decem aureis, qui ei debebantur, viginti petierit, aut si is, cujus ex parte res est, totam eam vel majore ex parte suam esse intenderit. Tempore: veluti si quis ante diem vel ante condicionem petierit. Qua ratione enim qui tardius solvit, quam solvere deberet, minus solvere intellegitur, eadem ratione,

33. Formerly, if a plaintiff claimed in his *intentio* more than his due, he failed in his action, that is, he lost the thing owing to him, nor was it easy for him to get reinstated by the prætor unless he was under the age of twenty-five years; for in this, as well as in other cases, in which aid was given on good ground for it being proved, it was usual to aid the plaintiff if it appeared that he had made an error owing to his youth. If, however, the reasons which betrayed him into the mistake were such as might have misled the most careful man, relief was given even to persons of full age. For example, if a legatee had demanded his whole legacy, and codicils were afterwards produced by which a part of it was taken away, or new legacies given to other persons, so that the plaintiff appeared to have demanded more than the three-fourths to which the legacies were reduced by the *lex Falcidia*. A man may demand more than what is due to him in four ways—in respect to the thing, to the time, to the place, and to the circumstances. In respect to the thing, as when the plaintiff, instead of ten *aurei*, which are due to him, demands twenty; or if, although owner of but part of some particular thing, he claims the

qui præmature petit, plus petere videtur. Loco plus petitur, veluti cum quis id, quod certo loco sibi stipulatus est, alio loco petit sine commemoratione illius loci, in quo sibi dari stipulatus fuerit: verbi gratia si is, qui ita stipulatus fuerit 'Ephesi dare spondes?' Romæ pure intendat dari sibi oportere. Ideo autem plus petere intellegitur, quia utilitatem, quam habuit promissor, si Ephesi solveret, adimit ei pura intentione: propter quam causam alio loco petenti arbitraria actio proponitur, in qua scilicet ratio habetur utilitatis, quæ promissori competitura fuisset, si illo loco solveret. Quæ utilitas plerumque in mercibus maxima invenitur, veluti vino, oleo, frumento, quæ per singulas regiones diversa habent pretia: sed et pecuniæ numeratæ non in omnibus regionibus sub iisdem usuris fenerantur. Si quis tamen Ephesi petat, id est eo loco petat, quo, ut sibi detur, stipulatus est, pura actione recte agit: idque etiam prætor monstrat, scilicet quia utilitas solvendi salva est promissori. Huic autem, qui loco plus petere intellegitur, proximus est is, qui causa plus petit: ut ecce si quis ita a te stipulatus sit 'hominem Stichum aut decem aureos dare spondes?' deinde alterutrum petat, veluti hominem tantum aut decem aureos tantum. Ideo autem plus petere intellegitur, quia in eo genere stipulationis promissoris est electio, utrum pecuniam an hominem solvere malit: qui igitur pecuniam tantum vel hominem tantum sibi dari oportere intendit, eripit electionem adversario et eo modo suam quidem meliorem condicionem facit, adversarii vero sui deteriorem. Qua de causa talis in ea re prodita est actio, ut quis intendat, hominem Stichum aut aureos decem sibi dari oportere, id est ut eodem modo peteret, quo stipulatus est. Præterea si quis generaliter hominem stipulatus sit et specialiter Stichum petat, aut generaliter vinum stipulatus, specialiter Campanum petat, aut generaliter purpuram stipulatus sit, deinde specialiter Tyriam petat: plus petere intellegitur, quia electionem adversario tollit, cui stipulationis jure liberum fuit aliud solvere, quam quod peteretur. Quin etiam licet

whole, or a greater share than he is entitled to. In respect to time, as when the plaintiff makes his demand before the day of payment, or before the performance of a condition; for just as he who does not pay so soon as he ought is held to pay less than he ought, so whoever makes his demand prematurely, demands more than his due. In respect to place, as when any person sues in another place for something stipulated to be delivered at a particular place, without mentioning the place fixed by the stipulation; for example, if, having stipulated in these words, 'Do you promise to give at Ephesus?' any one should afterwards bring an action at Rome, merely stating that the defendant ought to give. In this case the plaintiff would demand more than his due, as he would, by his *intentio* thus conceived simply, deprive the promissor of the advantage he might have in paying at Ephesus. And it is thus that a plaintiff, suing in a place different from that agreed on, has provided for him an arbitrary action in which allowance is made for the advantage which the debtor might have reaped from paying his debt in the place agreed on. This advantage is generally found to be most considerable in different kinds of merchandise, as in wine, oil, corn, of which the price differs in different places. Money itself, again, is not lent everywhere at the same interest. But if a man brings his action at Ephesus, that is, at the place fixed by the stipulation, he may validly bring an action without mention of the place agreed on for payment: and this the prætor, too, points out, because all the advantage the debtor will have in paying at the particular place is secured to him. In respect to the circumstances, he who demands more than his due in this way approaches very nearly to him who demands more than his due in respect of place; as, for instance, if any one stipulates thus with you, 'Do you promise to give either your slave Stichus or ten *aurei*?' and then demands either the slave only, or the money only. He would in this case be held to have demanded more than his due, because in such a stipulation the promissor has the right to choose whether he will give the slave or the money. He, therefore, who claims either the money only, or the slave only, takes away his adversary's power

vilissimum sit, quod quis petat, nihilo minus plus petere intellegitur, quia sæpe accidit, ut promissori facilius sit illud solvere, quod majoris pretii est. Sed hæc quidem antea in usu fuerant. Postea autem lex Zenoniana et nostra rem coartavit, et si quidem tempore plus fuerit petitum, quid statui oportet, Zenonis divæ memoriæ loquitur constitutio: sin autem quantitate vel alio modo plus fuerit petitum, omne, si quid forte damnum ut in sportulis ex hac causa acciderit ei, contra quem plus petitum fuerit, commissa tripli condemnatione, sicut supra diximus, puniatur.

of choice, and thus makes his own condition better, and that of his adversary worse; and accordingly an action has been provided by which in such a case the plaintiff maintains that either the slave Stichus ought to be given him, or the money, and thus makes a demand in conformity with the stipulation. So, too, if a man stipulates generally that a slave, or wine, or purple be given him, and afterwards sues for the slave Stichus, the wine of Campania, the purple of Tyre, he is held to demand more than his due, for he thus takes the power of election from his adversary, to whom it was open by the terms of the stipulation to pay something different from what is demanded. Nay, even if the thing actually sued for is the least valuable of its kind, yet the plaintiff is held to claim more than his due, because it is often easier for the debtor to pay a thing of greater value. Such was the law formerly in use. But considerable limitations have been imposed on its operation by the constitution of the Emperor Zeno, and by our own. If more than is due is demanded in respect of time, the constitution of Zeno of glorious memory decides what must be done; if in respect of quantity, or in any other way, then the plaintiff is to be punished, as we have said above, by having to pay a sum triple the amount of any loss sustained by the defendant, for example, by increased court fees.

GAI. iv. 53.; D. iv. 4. 1. 1; D. iv. 6. 1. 1; D. xiii. 4; C. iii. 10. 1, 2.

Under the system of *formulæ*, a *plus-petitio* or *pluris-petitio* had the effect of making the plaintiff fail entirely in an *actio stricti juris*, when the error was in the *intentio*, and the *intentio* was for a thing certain. Supposing this were the case, as the formula would run *si paret decem nummos, &c., condemna, si non absolve*, then, if the defendant owed only nine *nummi*, he did not owe ten, and so the *judex* could not condemn him. The plaintiff failed, and having once come *in judicio*, the *litis contestatio* operated as a novation of the cause of action (see Bk. iii. Tit. 29. 3 note), and, his original claim being thus cut away, he was left entirely without remedy, and could take no further proceedings to enforce his demand.

Of course, if the demand was for a thing uncertain, there could be no *plus-petitio* in this sense. If there was an error in the *demonstratio*, the plaintiff was not at all prejudiced. If there was a mistake in the *condemnatio*, making it more unfavourable to the defendant than it ought to have been, it was the

defendant who would be prejudiced; but the prætor would grant a new formula, and so rectify the mistake. (See GAI. iv. 53-60, reading in 57, *sed (reus cum) iniquam formulam acceperit.*)

Under the system of the *judicia extraordinaria* a *plus-petitio* would mean any claim in excess contained in the *libellus conventionis.* The text informs us of the mode in which such a mistake or misstatement was punished when the *plus-petitio* was not one *tempore.* If the *plus-petitio* was *tempore,* i.e. if the plaintiff sued before the proper time, he was condemned by the constitution of Zeno (C. iii. 10. 1) to wait double the time he ought originally to have waited, and, on renewing the action, to reimburse the defendant all expenses he might have been put to by the action improperly brought.

Sicut supra diximus refers to the case of the *damnum* being the exaction of a larger fee by the officers of the court, as mentioned in paragr. 24.

34. Si minus in intentione complexus fuerit actor, quam ad eum pertineret, veluti si, cum ei decem deberentur, quinque sibi dari oportere intenderit, aut cum totus fundus ejus esset, partem dimidiam suam esse petierit, sine periculo agit: in reliquum enim nihilo minus judex adversarium in eodem judicio condemnat ex constitutione divæ memoriæ Zenonis.

34. If a plaintiff includes less in his *intentio* than he has a claim to, demanding, for instance, only five *aurei* when ten are due, or the half of an estate when the whole belongs to him, he runs no risk; for the judge may, by the constitution of Zeno of glorious memory, condemn in the same action the defendant to pay the remainder of what is due to the plaintiff.

GAI. iv. 56; C. iii. 10. 1. 3.

Under the prætorian system, a plaintiff who claimed a less amount than was really due to him, could bring another action for the surplus if he waited until another prætor came into office. (GAI. iv. 56.) Zeno allowed the *judex* to add the surplus in condemning the defendant.

35. Si quis aliud pro alio intenderit, nihil eum periclitari placet, sed in eodem judicio cognita veritate errorem suum corrigere ei permittimus, veluti si is, qui hominem Stichum petere deberet, Erotem petierit, aut si quis ex testamento sibi dari oportere intenderit, quod ex stipulatu debetur.

35. When a plaintiff demands one thing instead of another, he incurs no risk. For if he discovers the truth, he is allowed to correct his mistake in the same action; as if he should demand the slave Eros instead of Stichus, or should claim as due by virtue of a testament what is really due upon a stipulation.

GAI. iii. 55.

In the time of Gaius, a plaintiff who demanded one thing instead of another, lost the action, but could recover the thing really due in a subsequent action. Justinian permitted the mistake to be retrieved in the same action, as the text informs us.

36. Sunt præterea quædam actiones, quibus non solidum, quod debetur nobis, persequimur, sed modo solidum consequimur, modo

36. There are, again, certain actions by which we do not always sue for the whole of what is due to us, but sometimes for the whole, sometimes for less.

minus. Ut ecce si in peculium filii servive agamus: nam si non minus in peculio sit, quam persequimur, in solidum pater dominusve condemnatur: si vero minus inveniatur, eatenus condemnat judex, quatenus in peculio sit. Quemadmodum autem peculium intellegi debeat, suo ordine proponemus.

For example, when a suit is brought so as to form a claim against the *peculium* of a son or a slave, then, if the *peculium* is sufficient to answer the demand, the father or master is condemned to pay the whole debt; but if the *peculium* is not sufficient, he is condemned to pay only to the extent of the *peculium*. We will hereafter explain, in its proper place, how the *peculium* is to be estimated.

C. iv. 26. 12.

We here enter on another division of actions, according to which actions, by which the whole of what was due was obtained, are distinguished from those by which sometimes the whole, sometimes less than the whole, of what was due was obtained.

Suo ordine; see next Title.

37. Item si de dote judicio mulier agat, placet, eatenus maritum condemnari debere, quatenus facere possit, id est quatenus facultates ejus patiuntur. Itaque si dotis quantitati concurrant facultates ejus, in solidum damnatur: si minus, in tantum, quantum facere potest. Propter retentionem quoque dotis repetitio minuitur: nam ob impensas in res dotales factas marito retentio concessa est, quia ipso jure necessariis sumptibus dos minuitur, sicut ex latioribus digestorum libris cognoscere licet.

37. Thus, too, if a wife brings an action for the restitution of her *dos*, the husband must be condemned to pay only as far as he is able, i.e. as far as his means permit. Therefore, if his means admit of his paying the whole amount of the *dos* he is condemned to pay the whole; if not, he must pay as much as it is in his power to pay. The claim of a wife for the restitution of her *dos* may also be lessened by the husband having a right to retain something; for the husband is permitted to retain a sum equivalent to the expenses he has incurred upon the things given, since the marriage portion is by law diminished by the amount of all necessary expenses, as may be seen in fuller detail in the Digest.

D. xxiv. 3. 12, 14; D. xxv. 1. 5.

The privilege of having the *condemnatio* reduced, *duntaxat in id quatenus facere potest*, i.e. of being condemned only in an amount which he could pay without being reduced to a state of destitution (D. l. 17. 173. pr.), a privilege called by the commentators the *beneficium competentiæ*, was accorded to the defendant in several other cases besides those mentioned in the text and in the next paragraph and in paragr. 40. We may instance the case of one brother sued by another, and every case arising between man and wife, except claims grounded on delicts. (D. xlii. 1. 20.) This privilege was always personal, and did not avail either heirs or sureties.

If the debtor subsequently had funds, he had to pay what under the *beneficium competentiæ* he left unpaid. (C. v. 18. 8.) In calculating how much the debtor could pay, account was only taken of what he possessed, without deduction for what he owed, except in the one case of the donor, who might deduct his debts. (D. xlii. 1. 19.)

Propter retentionem dotis. The husband might deduct the amount of all necessary expenses incurred in the management of the property constituting the marriage portion. If the expenses had been only profitably and not necessarily incurred, that is, were *utiles*, and not *necessariæ*, Justinian only allowed the husband to bring an *actio mandati*, or an *actio negotiorum gestorum*, to reimburse himself; whereas, previously, he had been able to deduct such expenses as well as those that were *necessariæ*. (D. l. 16. 79; C. v. 13. 1. 5.)

38. Sed et si quis cum parente suo patronove agat, item si socius cum socio judicio societatis agat, non plus actor consequitur, quam adversarius ejus facere potest. Idem est, si quis ex donatione sua conveniatur.

38. If any person sues his ascendant or patron, or one partner sues another in an action of partnership, he cannot obtain a greater sum than his adversary is able to pay. It is the same when a donor is sued for his gift.

D. xlii. 1. 16, 19.

39. Compensationes quoque oppositæ plerumque efficiunt, ut minus quisque consequatur, quam ei debeatur: namque ex bono et æquo, habita ratione ejus, quod invicem actorem ex eadem causa præstare oporteret, in reliquum eum, cum quo actum est, condemnare licet, sicut jam dictum est.

39. Sets-off too, opposed by one party to the claims of the other, often bring about the result that the plaintiff recovers less than is due to him; for the judge, proceeding on equitable principles, may take account of whatever the plaintiff ought to make good in reference to the same set of circumstances, and may condemn the defendant to pay the balance only, as has already been observed.

GAI. iv. 61.

If the defendant was not only a debtor but a creditor of the plaintiff, if he had something owing to him from the plaintiff as well as owed something to him, it was evidently the most convenient way that he should be allowed to balance one debt against the other (*compensatio*, *pendere cum*), and only account for the surplus, supposing a surplus was still due from him.

Under the prætorian system, in all actions *bonæ fidei*, the judge, who could take all the circumstances of the case into his consideration, set off, as a matter of course, any debt due to the defendant from the plaintiff in consequence of the same set of circumstances (*ex eadem causa*) by which the debt on which the action was brought became due. (GAI. iv. 61.) In one case, however, viz. that of a banker (*argentarius*), a much stricter system prevailed. The *argentarius* could only sue a customer for the sum due to him after allowing for what he owed to the customer. If he sued for more, it was a *plus-petitio*. (GAI. iv. 64.) The *bonorum emptor*, or purchaser of an insolvent's estate, had also to make a deduction of what was due to the defendant from the insolvent when he sued a debtor of the insolvent. (GAI. iv. 65.) Between this *deductio* and the *compensatio* required from the *argentarius* there were some differences: *compensatio* was only of things of the same kind, only of debts due, and had to be inserted in the *intentio;* whereas the *deductio* was of things of different kinds, of

debts not yet due as well as debts due, and being inserted in the *condemnatio* did not expose the plaintiff to the risk of *plus-petitio*. (GAI. iv. 66-68.) In the actions *stricti juris*, which arose from unilateral, not bilateral contracts, there could be no reciprocal rights, as in a bilateral contract, giving the defendant a claim *ex eadem causa*. But the rule grew up and was confirmed by a rescript of Marcus Aurelius (see par. 30); *dolo facit qui petit quod redditurus est*. (D. xliv. 4. 8. pr.) If the plaintiff claimed a sum which directly he had obtained it he would have to pay back to the defendant, he was guilty of a *dolus*; he had acted as if he had a right to the money, whereas he had not. Accordingly the defendant could avail himself of the exception of *dolus*. What the effect of this exception was is not certain. Some think that if the plaintiff was found to owe the defendant anything of a similar kind, although *ex dispari causa*, which he had not allowed for in stating the amount of his claim, he entirely failed in his action. He did not recover any surplus which might be really due to him. The exception stopped the action altogether. The formula ran: *Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat . . . condemna; si non paret, absolve. Dolus malus* did appear, and all the *judex* could do was to absolve the defendant. (PAUL. *Sent.* ii. 5. 3.) Others suppose that the defendant had to pay any balance found to be due by him. (See DEMANGEAT, ii. 629.)

But we must not suppose that *compensatio* was originally looked on as a means of extinguishing an obligation. In theory of law, each debt subsisted separately. Certainly in the case of the *argentarius* it is hard to draw a line between an extinction of obligation and the way in which debts due to customers were necessarily deducted; but it was necessary that the debts due to and from the *argentarius*, although *ex dispari causa*, should be *in eadem re*, that is, should both consist, for instance, of money or wine. This was an exceptional case, and, generally speaking, the two debts clearly subsisted together, although, when, by submitting the facts to the knowledge of the *judex* in the case of actions *bonæ fidei*, and by the *exceptio doli* in the action of law, the set-off was claimed, its effects were retroactive, and may be said to have commenced from the moment when the two debts first began to exist together. (C. iv. 31. 4.)

Under Justinian the debts were held to operate as mutually extinguishing each other *ipso jure*. When the parties came before the *judex*, he ascertained their respective claims on each other, and if there was, on the whole, a balance in favour of the plaintiff, awarded the amount to him. All the old distinctions were done away, and it no longer made any difference whether the two debts arose from the same transaction, or whether things of the same kind were payable (the words *ex eadem causa* in the text are, therefore, under Justinian's legislation, inaccurate). But Justinian made it requisite that the defendant's claim should be clearly well founded, and that the amount should be at once ascertainable, and

not need further inquiry to determine it (*causa liquida*) (see C. iv. 31. 14. 1), and he would not allow any set-off to an *actio depositi*. (See paragr. 30.)

40. Eum quoque, qui creditoribus suis bonis cessit, si postea aliquid adquisierit, quod idoneum emolumentum habeat, ex integro in id, quod facere potest, creditores cum eo experiuntur: inhumanum enim erat spoliatum fortunis suis in solidum damnari.

40. So, when a debtor who has made a cession of his goods to his creditors subsequently acquires something of an advantageous character, the creditors may compel him by a fresh action to pay as much as he is able, but not more; for it would be inhuman to condemn a man to pay the full amount who has already been deprived of all his property.

D. xlii. 3. 4, 6.

Tit. VII. QUOD CUM EO, QUI IN ALIENA POTESTATE EST, NEGOTIUM GESTUM ESSE DICITUR.

Quia tamen superius mentionem habuimus de actione, quæ in peculium filiorumfamilias servorumque agitur: opus est, ut de hac actione et de ceteris, quæ eorundem nomine in parentes dominosve dari solent, diligentius admoneamus. Et quia, sive cum servis negotium gestum sit sive cum his, qui in potestate parentis sunt, fere eadem jura servantur, ne verbosa fiat disputatio, dirigamus sermonem in personam servi dominique, idem intellecturi de liberis quoque et parentibus, quorum in potestate sunt. Nam si quid in his proprie observetur, separatim ostendemus.

We have already spoken of the action which may be brought relative to the *peculium* of *filiifamilias* or of slaves. And we must now speak of it more fully, and also of all other actions which may be brought against ascendants and masters as representing children and slaves. But, as the law is almost the same, whether the dealing is with a slave, or with one under the power of an ascendant, to avoid prolixity, we will treat only of slaves and their masters, leaving what we say of them to be understood as applicable also to children and the ascendants, under whose power they are. For anything which is peculiar to children and ascendants we will point out separately.

Gai. iv. 69.

By the strict rule of the civil law, the parent or master could not be bound or prejudiced by any act of a child or slave. But a sense of equity gradually broke in upon this rule, and, in certain cases, the contracts and delicts of persons *alieni juris* came to affect those in whose power these persons were.

This Title treats of the contracts of persons *alieni juris* which were considered to concern the master or parent (1) whenever they were made by his order, whether expressly or by implication, and (2) whenever he had profited by them.

1. Si igitur jussu domini cum servo negotium gestum erit, in solidum prætor adversus dominum actionem pollicetur, scilicet quia qui ita contrahit, fidem domini sequi videtur.

1. Thus, then, if any one deals with a slave acting under the command of his master, the prætor will give an action against the master for the whole of what is due under the contract; inasmuch as, in this case, the person who contracts does so as relying on the faith of the master.

Gai. iv. 70.

Jussu domini; this extended to cases where the master subsequently ratified the contract, the ratification being equivalent to a mandate. (D. xv. 4. 1. 6.)

If the slave had been merely the instrument of his master, if, for instance, the master arranged that money borrowed for himself should be told out to his slave, the prætor would give a *condictio*, not an action *quod jussu*. (D. xv. 4. 5. pr.)

2. Eadem ratione prætor duas alias in solidum actiones pollicetur, quarum altera exercitoria, altera institoria appellatur. Exercitoria tunc locum habet, cum quis servum suum magistrum navis præposuerit et quid cum eo ejus rei gratia, cui præpositus erit, contractum fuerit. Ideo autem exercitoria vocatur, quia exercitor appelatur is, ad quem cottidianus navis quæstus pertinet. Institoria tunc locum habet, cum quis tabernæ forte aut cuilibet negotiationi servum præposuerit et quid cum eo ejus rei causa, cui præpositus erit, contractum fuerit. Ideo autem institoria appellatur, quia qui negotiationibus præponuntur, institores vocantur. Istas tamen duas actiones prætor reddit et si liberum quis hominem aut alienum servum navi aut tabernæ aut cuilibet negotiationi præposuerit, scilicet quia eadem æquitatis ratio etiam eo casu interveniebat.

2. For the same reason the prætor also gives two other actions for the whole sum due, the one called the *actio exercitoria*, the other the *actio institoria*. The action *exercitoria* may be brought when a master has made his slave commander of a vessel, and a contract has been entered into with the slave relating to the business he has been appointed to manage. This action is named *exercitoria*, because he, to whom the daily profits of a ship belong, is said to be an *exercitor*. The action *institoria* may be brought when a master has entrusted his slave with the management of a shop or any particular business, and a contract has been made with the slave relating to the business he has been appointed to manage. This action is called *institoria*, because persons to whom the management of a business is entrusted are called *institores*. The prætor likewise permits these two actions to be brought if any one commits to a free person, or to the slave of another, the management of a ship, a warehouse, or any particular affair, as the principle of equity is the same.

Gai. iv. 71.

Liberum hominem. We have seen at how late a period of Roman law it was that one freeman could act for another. (See Bk. iii. Tit. 26. pr. note.) It was, in fact, by extending these actions *institoria* and *exercitoria*, so as to embrace the case of a mandatary, that the prætor made the principal directly responsible, and thus enabled him to be really represented by the agent.

3. Introduxit et aliam actionem prætor, quæ tributoria vocatur. Namque si servus in peculiari merce, sciente domino, negotietur et quid cum eo ejus rei causa contractum erit, ita prætor jus dicit, ut, quidquid in his mercibus erit quodque inde receptum erit, id inter dominum, si quid ei debebitur, et ceteros creditores pro rata portione distribuatur. Et quia ipsi domino distributionem

3. The prætor has also introduced another action called *tributoria;* for, if a slave with the knowledge of his master trades with his *peculium*, and contracts are made with him in the course of business, the prætor ordains that all the merchandise or money arising from his traffic shall be distributed between the master, if anything is due to him, and the rest of the creditors of the slave in proportion to

permittit, si quis ex creditoribus queratur, quasi minus ei tributum sit, quam oportuerit, hanc ei actionem accommodat, quæ tributoria appellatur.

their claims. And as the master himself is permitted to make the distribution, if any creditor complains that he has received too small a share, the prætor will permit him to bring the *actio tributoria*.

GAI. iv. 72; D. xiv. 4. 1; D. xiv. 4. 5. 11; D. xiv. 4. 7. 1, 2.

The *actio tributoria* was only given against the master when there was fraud (*dolus*) in the distribution; but there would be *dolus* directly the master had notice that a creditor had received nothing, or less than his share. (D. xiv. 4. 7. 2, 3.)

4. Præterea introducta est actio de peculio deque eo, quod in rem domini versum erit, ut, quamvis sine voluntate domini negotium gestum erit, tamen sive quid in rem ejus versum fuerit, id totum præstare debeat, sive quid non sit in rem ejus versum, id eatenus præstare debeat, quatenus peculium patitur. In rem autem domini versum intellegitur, quidquid necessario in rem ejus impenderit servus, veluti si mutuatus pecuniam creditoribus ejus solverit, aut ædificia ruentia fulserit, aut familiæ frumentum emerit, vel etiam fundum aut quamlibet aliam rem necessariam mercatus erit. Itaque si ex decem utputa aureis, quos servus tuus a Titio mutuos accepit, creditori tuo quinque aureos solverit, reliquos vero quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes, pro ceteris vero quinque eatenus, quatenus in peculio sit: ex quo scilicet apparet, si toti decem aurei in rem tuam versi fuerint, totos decem aureos Titium consequi posse. Licet enim una est actio, qua de peculio deque eo, quod in rem domini versum sit, agitur, tamen duas habet condemnationes. Itaque judex apud quem ea actione agitur, ante dispicere solet, an in rem domini versum sit, nec aliter ad peculii æstimationem transit, quam si aut nihil in rem domini versum intellegatur aut non totum. Cum autem quæritur, quantum in peculio sit, ante deducitur, quidquid servus domino quive in potestate ejus sit, debet, et quod superest, id solum peculium intellegitur. Aliquando tamen id, quod ei debet servus, qui in potestate domini sit, non deducitur ex peculio, veluti si is in hujus ipsius peculio sit. Quod

4. The prætor has also introduced an action relating at once to a *peculium*, and to whatever has been applied to the profit of the master, for although the slave contracts without the consent of his master, yet the master ought, if he has profited by anything, to pay all up to the amount of his profit; if he has not received any profit, he ought to pay up to the amount of the slave's *peculium*. Everything is understood as profiting the master which is laid out in his necessary expenses by the slave; as, for instance, if the slave borrows money with which he pays the debts of his master, repairs his buildings in danger of falling, purchases wheat for the establishment, or land for his master, or any other necessary thing. Thus if your slave borrows ten *aurei* of Titius, pays five to one of your creditors, and spends five, you ought to be condemned to pay the whole of the first five, and so much of the other five as the slave's *peculium* would cover; whence it will appear, that if all the ten *aurei* had been spent to your profit, Titius might have recovered the whole from you; for although it is the same action in which the plaintiff seeks to obtain the *peculium*, and the amount by which the master has profited, yet this action contains two condemnations. The judge before whom the action is brought, first inquires whether the master has received any profit; and then, when he has ascertained that no part or not the whole of the sum due from the slave has been expended to the profit of the master, he proceeds to estimate the value of the *peculium*, in estimating which a deduction is first made of what the slave owes his master, or any one under the power of his master, and the remainder only is considered as the *peculium*. But it sometimes happens that what a slave

eo pertinet, ut, si quid vicario suo servus debeat, id ex peculio ejus non deducatur.

owes to a person in the power of his master is not deducted, as when he owes something to a slave who forms part of his own *peculium*: that is to say, if a slave is indebted to his *vicarius*, the sum due cannot be deducted from the *peculium*.

GAI. iv. 73; D. xiv. 5. 1; D. xv. 3. 3. 1; D. xv. 1. 17.

This action is generally called *de peculio et in rem verso*, because, in most cases, the judge had to take notice of both the profit derived by the master and of the amount of the slave's *peculium*. But in some cases, as, for instance, where the slave had no *peculium*, the action could be brought *de in rem verso* only, and so it would naturally be if it could be shown that the master had reaped all the benefit of the contract. (See end of next paragraph.)

Si quid vicario. The *vicarii* formed part of the *peculium* of the ordinary slave; anything, therefore, deducted from the *peculium*, as owed to the *vicarii*, would, if paid, again enter into the *peculium* as the property of the ordinary slave. It was, therefore, useless to pay it.

5. Ceterum dubium non est, quin is quoque, qui jussu domini contraxerit cuique institoria vel exercitoria actio competit, de peculio deque eo, quod in rem domini versum est, agere possit: sed erit stultissimus, si omissa actione, qua facillime solidum ex contractu consequi possit, se ad difficultatem perducat probandi, in rem domini versum esse, vel habere, servum peculium et tantum habere, ut solidum sibi solvi possit. Is quoque, cui tributoria actio competit, æque de peculio et in rem verso agere potest: sed sane huic modo tributoria expedit agere, modo de peculio et in rem verso. Tributoria ideo expedit agere, quia in ea domini condicio præcipua non est, id est, quod domino debetur, non deducitur, sed ejusdem juris est dominus, cujus et ceteri creditores: at in actione de peculio ante deducitur, quod domino debetur et in id, quod reliquum est, creditori dominus condemnatur. Rursus de peculio ideo expedit agere, quod in hac actione totius peculii ratio habetur, at in tributoria ejus tantum, quod negotiatur, et potest quisque tertia forte parte peculii aut quarta vel etiam minima negotiari, majorem autem partem in prædiis et mancipiis aut fenebri pecunia habere. Prout ergo expedit, ita quisque vel hanc actionem vel

5. It need hardly be said that a person who has contracted with a slave acting by his master's command, and who may bring either the action *institoria* or *exercitoria*, may also bring the action *de peculio et in rem verso*. But it would be the height of folly in any one to give up an action by which he might easily recover his whole demand, and have recourse to another by which he would be reduced to the difficulty of proving that the money he lent to the slave was employed to the profit of the master, or that the slave is possessed of a *peculium*, and that sufficient to answer the whole debt. Any one, again, in whose power it is to bring the *actio tributoria*, may equally bring the action *de peculio et in rem verso*; and it is expedient, in some cases, to employ the former, and in some cases the latter. On the one hand, the *actio tributoria* is preferable, because in this no privilege is accorded to the master, i.e. there is no previous deduction made in his favour of what is due to him, but he stands in the same position as the rest of the creditors; whereas in the action *de peculio*, there is first deducted the debt due to the master, who is only condemned to distribute the remainder among the creditors. On the other hand, in some cases, it may be more convenient to bring the action *de peculio*, because it affects the whole

illam eligere debet: certe qui potest probare, in rem domini versum esse, de in rem verso agere debet.

peculium, whereas the action *tributoria* affects only so much of it as has been employed in trade; and it is possible that a slave may have traded only with a third, a fourth, or some very small part of it, and that the rest may consist in lands, slaves, or money lent at interest. Every one ought, therefore, to select the one or the other action as may seem most advantageous to him. If, however, a creditor can prove that anything has been employed to the profit of the master, he ought to bring the action *de in rem verso*.

GAI. iv. 74; D. xiv. 4. 11.

Any one who could bring an *actio quod jussu, exercitoria*, or *institoria*, could also, at option, bring an *actio de peculio et in rem verso*, but not at all necessarily *vice versa*.

6. Quæ diximus de servo et domino, eadem intellegimus et de filio et filia aut nepote et nepte, et patre avove, cujus in potestate sunt.

6. What we have said in relation to a slave and his master, is equally applicable to children and grandchildren, and to their ascendants, in whose power they are.

D. xiv. 4. 1. 4.

It may be observed, however, that (1) the master was never bound, if the slave engaged himself by mandate, or *fidejussio*, for a third person, but the father was bound to the extent of a son's *peculium* by the son's *intercessio* (D. xv. 1. 3. 9), and (2) the son was bound civilly, the slave only naturally. If the son was sued and condemned to pay, an action *judicati de peculio* could be brought against the father to the extent of the son's *peculium*. (D. xv. 1. 3. 11.)

7. Illud proprie servatur in eorum persona, quod senatusconsultum Macedonianum prohibuit, mutuas pecunias dari eis, qui in parentis erunt potestate: et ei, qui crediderit, denegatur actio tam adversus ipsum filium filiamve, nepotem neptemve, sive adhuc in potestate sunt, sive morte parentis vel emancipatione suæ potestatis esse cœperint, quam adversus patrem avumve, sive habeat eos adhuc in potestate sive emancipaverit. Quæ ideo senatus prospexit, quia sæpe onerati ære alieno creditarum pecuniarum, quas in luxuriam consumebant, vitæ parentium insidiabantur.

7. A peculiar provision has, however, been made in their favour by the *senatusconsultum Macedonianum*, which prohibits money to be lent to children under power of their parents, and refuses any action to the creditor, either against the descendants, whether still under power, or become *sui juris* by the death of the parent or by emancipation, or against the parent, whether he still retains them under his power, or has emancipated them. This provision was adopted by the senate, because they thought that persons under power, when loaded with debts contracted by borrowing sums to be wasted in debauchery, often attempted the lives of their parents.

D. xiv. 6. 1. pr.; D. xiv. 6. 3. 3; D. xiv. 6. 7. 10.

The *senatusconsultum Macedonianum* was made, according to Tacitus, in the reign of Claudius (*Ann.* xi. 13); according to Suetonius, in that of Vespasian (*Vesp.* 11). Perhaps it was only

renewed in the later reign. Theophilus informs us that it was made to meet the case of a young prodigal named Macedo, who attempted the life of his father. The terms of the *senatusconsultum* (D. xiv. 6. 1. pr.) would rather lead us to suppose Macedo was the name of a usurer. The text says *denegatur actio;* but if there was any doubt as to the facts, the action was brought, and the*sena tusconsultum Macedonianum* made the ground of an exceptioen. (D. xiv. 6. 11.)

To the general rule that a *filiusfamilias* was not bound by a money debt, there were, however, numerous exceptions, the most important of which were as follows:—Such a claim was good against *peculiam castrense* or *quasi-castrense* (D. xiv. 6. 2); it was also valid if the borrower deceived his creditor by making him believe that he was a *paterfamilias*, or if the money went to pay another creditor to whom the *senatusconsultum* did not apply. Both the *filius* and the *paterfamilias* were responsible for a debt contracted with the consent of the latter or if it were subsequently ratified by him; and, again, the *senatusconsultum* did not apply when the money was borrowed for the benefit of the *paterfamilias*. (D. xiv. 6. 8.)

8. Illud in summa admonendi sumus, id, quod jussu patris dominive contractum fuerit quodque in rem ejus versum fuerit, directo quoque posse a patre dominove condici, tamquam si principaliter cum ipso negotium gestum esset. Ei quoque, qui vel exercitoria vel institoria actione tenetur, directo posse condici placet, quia hujus quoque jussu contractum intellegitur.

8. Lastly, we may observe, that whenever any contract has been made by command of a father or master, or anything employed to their profit, a *condictio* may be brought directly against the father or master, exactly as if the contract had been originally made with them. So when any one is liable to the action *exercitoria* or *institoria*, a *condictio* may also be brought directly against him, as in this case also it is by his order that the contract is understood to have been made.

D. xvii. 2. 84; D. xiv. 3. 17. 5; D. xii. 1. 29.

Posse condici. If a condiction could be brought, of what use were the peculiar prætorian actions of which, as the text informs us, the plaintiff could avail himself? Probably the institution of these actions was long antecedent to the time when the condiction was admitted as an appropriate form of action in cases where a *paterfamilias* was to be made responsible for the acts of his son or slave. It was only by a great extension of the scope of the condiction that it was given, first, when one man profited in any way by the property of another (D. xii. 1. 23, 32); and, secondly, against a person by whose order another person had contracted, or whose manager (*institor*) the person contracting was (D. xii. 1. 9. 2). After it had received this extension, the *condictio* would be a concurrent remedy with the prætorian actions. But there would still be cases, namely, bilateral contracts, giving rise to prætorian actions, such as those *empti* or *venditi*, *pro socio*, *locati* or *conducti*, or contracts giving rise to actions *in factum*, in which the condiction would not be given against the *paterfamilias*, and

in which recourse must be had to the prætorian actions proper to the kind of contract. These prætorian actions would, in the particular case of the *paterfamilias*, receive a slight modification of form and a new name, and be termed *quod jussu, de in rem verso, de peculio*, &c., though remaining substantially *empti, locati, pro socio*, &c., according to the character of the transaction.

TIT. VIII. DE NOXALIBUS ACTIONIBUS.

Ex maleficiis servorum, veluti si furtum fecerint aut bona rapuerint aut damnum dederint aut injuriam commiserint, noxales actiones proditæ sunt, quibus domino damnato permittitur, aut litis æstimationem sufferre aut hominem noxæ dedere.

The wrongful acts of a slave, whether he commits a theft or robbery, or does any damage or injury, give rise to noxal actions in which the master of the slave, if judgment is against him, may either pay the estimated amount of damage done, or deliver up his slave as a *noxa*.

GAI. iv. 75; D. ix. 4. 1.

We now pass to actions given to enforce obligations arising from the delicts of persons *alieni juris*. These actions, which were given against the master of the slave, and, in ancient times, against the parent of the *filiusfamilias*, were termed *noxales* because the master or parent could rid himself of all liability by abandoning the slave or child committing the delict to the person injured. There was, however, no distinct *actio noxalis*. The action brought on the delict was one *furti, vi bonorum raptorum*, &c., as the case might be, the difference being that the *condemnatio* was alternative, either to pay so much or to abandon the slave, instead of simply to pay so much.

If at any time, either before or after the *litis contestatio*, the master abandoned the slave, all right of action for damages against him became immediately extinct. The *actio noxalis* had thus a kind of resemblance to the *actiones arbitrariæ*, in which the *judex* first ordered the defendant to make satisfaction, and then, if he did not comply, proceeded to condemn him. In two cases the master could not escape liability by giving up the slave: (1) if he falsely denied that the slave was in his power (D. ii. 9. 2. 1); (2) if the master could have prevented the delict (D. ix. 4. 2. 1).

1. Noxa autem est corpus, quod nocuit, id est servus: noxia ipsum maleficium, veluti furtum, damnum, rapina, injuria.

1. *Noxa* is the body that has done the wrongful act, i.e. the slave. *Noxia* is the wrongful act itself, that is, the theft, the damage, the robbery with violence, or injury.

D. ix. 1. 1. 1.

2. Summa autem ratione permissum est noxæ deditione defungi: namque erat iniquum, nequitiam

2. It is with great reason that the master is permitted to deliver up the offending slave; for it would be very

eorum ultra ipsorum corpora dominis damnosam esse.

unjust, when a slave does a wrongful act, to subject the master to any further damage beyond that of losing the slave himself.

GAI. iv. 75.

3. Dominus noxali judicio servi sui nomine conventus, servum actori noxæ dedendo liberatur. Nec minus perpetuum ejus dominium a domino transfertur: si autem damnum ei, cui deditus est, resarcierit quæsita pecunia, auxilio prætoris, invito domino, manumittitur.

3. A master sued in a noxal action on account of his slave, frees himself if he gives up his slave to the plaintiff, and then the property in the slave is thus transferred for ever; but, if the slave can procure money, and satisfy the master to whom he has been given up for all damages he has sustained, he is manumitted by the intervention of the prætor, though against the wish of his new master.

4. Sunt autem constitutæ noxales actiones aut legibus aut edicto prætoris: legibus veluti furti lege duodecim tabularum, damni injuriæ lege Aquilia: edicto prætoris veluti injuriarum et vi bonorum raptorum.

4. Noxal actions are established either by the laws, or by the edict of the prætor. By the laws, as for theft, by the law of the Twelve Tables; for wrongful damage, by the *lex Aquilia;* by the prætor's edict, as for injuries and robbery with violence.

GAI. iv. 76.

These are but examples; any delict whatsoever committed by a slave would furnish ground for an *actio noxalis.*

5. Omnis autem noxalis actio caput sequitur. Nam si servus tuus noxiam commiserit, quamdiu in tua potestate sit, tecum est actio: si in alterius potestatem pervenerit, cum illo incipit actio esse, aut si manumissus fuerit, directo ipse tenetur et extinguitur noxæ deditio. Ex diverso quoque directa actio noxalis esse incipit: nam si liber homo noxiam commiserit et is servus tuus esse cœperit (quod casibus quibusdam effici primo libro tradidimus), incipit tecum esse noxalis actio, quæ ante directa fuisset.

5. Every noxal action follows the delinquent. The delicts committed by your slave are a ground of action against you, while the slave belongs to you; if the slave becomes subject to another, the action must be brought against the new master; but if the slave is manumitted, the action is brought directly against him, and there cannot then be any giving up of the slave in satisfaction. Conversely, an action, which was at first direct, may afterwards become noxal; for if a freeman commits a wrongful act, and then becomes your slave, which may happen in some cases, of which we have spoken in our First Book, then the direct action against the slave is changed into a noxal action against you.

GAI. iv. 77.

It was the person in possession of the slave, not necessarily his owner, who was liable for his delicts. The references to the First Book are Tit. 3. 4, and Tit. 16. 1.

6. Si servus domino noxiam commiserit, actio nulla nascitur: namque inter dominum et eum, qui in ejus potestate est, nulla obligatio nasci potest. Ideoque et si in alienam

6. If a slave commits a wrongful act against his master, no action can be brought; for no obligation can arise between a master and one in his power; and if the slave passes under the power

potestatem servus pervenerit aut manumissus fuerit, neque cum ipso neque cum eo, cujus nunc in potestate sit, agi potest. Unde si alienus servus noxiam tibi commiserit et is postea in potestate tua esse cœperit, intercidit actio, quia in eum casum deducta sit, in quo consistere non potuit: ideoque licet exierit de tua potestate, agere non potes, quemadmodum si dominus in servum suum aliquid commiserit, nec si manumissus vel alienatus fuerit servus, ullam actionem contra dominum habere potest.

of another master, or is manumitted, no action can be brought either against him or his new master; whence it follows, that, if the slave of another should commit a wrongful act against you, and become your slave, the action is extinguished, as it has become impossible in the actual position of the parties. And although he subsequently passes out of your power, yet you cannot bring an action. Neither, if a master injures his slave in any way, can the slave, after having been alienated or manumitted, bring any action against his master.

GAI. iv. 78.

The Proculians had thought that a master could, after a slave had passed out of his power, bring an action against the slave for anything done by him before he became his slave. (GAI. iv. 78.)

7. Sed veteres quidem hæc et in filiisfamilias masculis et feminis admiserunt. Nova autem hominum conversatio hujusmodi asperitatem recte respuendam esse existimavit et ab usu communi hæc penitus recessit: quis enim patitur filium suum et maxime filiam in noxam alii dare, ut pene per corpus filii pater magis, quam filius periclitetur, cum in filiabus etiam pudicitiæ favor hoc bene excludit? Et ideo placuit, in servos tantummodo noxales actiones esse proponendas, cum apud veteres legum commentatores invenimus sæpius dictum, ipsos filiosfamilias pro suis delictis posse conveniri.

7. The ancients, indeed, applied the same rules to children of both sexes in the power of ascendants; but the feeling of later times has rightly rejected such extreme rigour, and it has therefore passed wholly into disuse. For who could bear to deliver up as a *noxa* a son, and still more a daughter? for, in the person of his son, the father would almost suffer more than the son himself, and mere regard to decency forbids such treatment of a daughter. Noxal actions have, therefore, been allowed to apply to slaves only; and we find it often laid down in the older jurists, that an action may be brought directly against sons in power for their wrongful acts.

GAI. iv. 75, 77-79; D. ix. 4. 33-35.

A *filiusfamilias* could be sued for delicts, and then the plaintiff could by an *actio judicati* recover from the father up to the amount of the *peculium*. (Tit. 7. 6 note.)

TIT. IX. SI QUADRUPES PAUPERIEM FECISSE DICETUR.

Animalium nomine, quæ ratione carent, si quidem lascivia aut fervore aut feritate pauperiem fecerint, noxalis actio lege duodecim tabularum prodita est (quæ animalia si noxæ dedantur, proficiunt reo ad liberationem, quia ita lex duodecim tabularum scripta est); puta si

A noxal action is given by the law of the Twelve Tables, when irrational animals, through wantonness, rage, or ferocity, have done any damage; as, for example, if a kicking horse should kick, or an ox, apt to gore, should inflict an injury with his horns. If the animals are delivered up in satis-

equus calcitrosus calce percusserit aut bos cornu petere solitus petierit. Hæc autem actio in his, quæ contra naturam moventur, locum habet: ceterum si genitalis sit feritas, cessat. Denique si ursus fugit a domino et sic nocuit, non potest quondam dominus conveniri, quia desiit dominus esse, ubi fera evasit. Pauperies autem est damnum sine injuria facientis datum: nec enim potest animal injuriam fecisse dici, quod sensu caret. Hæc quod ad noxalem actionem pertinet.

faction for the damage done, the owner is secured against any action; such is the law of the Twelve Tables. But this action can only be brought in the case of animals acting contrary to their nature, for, when the ferocity of a beast is innate, no action can be brought so that, if a bear breaks loose from his master, and has so done mischief, the master cannot be sued; for he ceased to be the master as soon as the wild beast escaped. The word *pauperies* denotes a damage done without any wrong intent: for an animal void of reason cannot be said to have had a wrong intent. Thus much as to the noxal action.

D. ix. 1. 1. pr., 3, 4, 7, 10.

Although in the Twelve Tables the word *quadrupes* was used, all animals were held to be included under it.

The distinction noticed in the text is that between an animal with an inborn fierceness (*genitalis feritas*) and one with a confirmed vicious habit (*calcitrosus, petere solitus*). The owner of the latter only was liable to the *actio noxalis* given by the Twelve Tables.

If an animal fierce by nature did any damage while in the keeping of any one, his keeper would be liable to an *actio utilis*, though not to the direct *actio noxalis* given by the law of the Twelve Tables. (See next paragraph.)

1. Ceterum sciendum est, ædilitio edicto prohiberi nos canem, verrem, aprum, ursum, leonem ibi habere, qua vulgo iter fit: et si adversus ea factum erit et nocitum homini libero esse dicetur, quod bonum et æquum judici videtur, tanti dominus condemnetur, ceterarum rerum, quanti damnum datum sit, dupli. Præter has autem ædilitias actiones et de pauperie locum habebit: numquam enim actiones præsertim pœnales de eadem re concurrentes alia aliam consumit.

1. It must be observed, that the edict of the ædile forbids any man to keep a dog, a boar, a wild boar, a bear, or a lion, where there is a public road: and, if this prohibition is disobeyed, and thus any freeman receives hurt, the master of the beast may be condemned at the discretion of the judge; and, in case of damage to anything else, the condemnation must be in double the amount of damage done. Besides the ædilitian action, the action *de pauperie* may also be brought against the same person; for when different actions, especially penal actions, may be each brought on account of the same thing, the employment of one does not prevent the employment of another.

D. xxi. 1. 40-42; D. xliv. 7. 60.

The same delict might be resolvable into two distinct offences. A slave is corrupted, and then made to commit a theft. A separate action lay for each offence. Or the same delict, though consisting of one offence, might come under two heads of delict. A slave is injured by being beaten, and an action would lie *injuri-*

arum, or under the *lex Aquilia*. The master might bring both actions in succession, but he would only recover in the second any special advantages which that action might give him beyond what the first had given. (D. xliv. 7. 34. pr.)

TIT. X. DE HIS, PER QUOS AGERE POSSUMUS.

Nunc admonendi sumus, agere posse quemlibet aut suo nomine aut alieno. Alieno veluti procuratorio, tutorio, curatorio, cum olim in usu fuisset, alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela. Præterea lege Hostilia permissum est furti agere eorum nomine, qui apud hostes essent aut rei publicæ causa abessent quive in eorum cujus tutela essent. Et quia hoc non minimam incommoditatem habebat, quod alieno nomine neque agere neque excipere actionem licebat, cœperunt homines per procuratores litigare: nam et morbus et ætas et necessaria peregrinatio itemque aliæ multæ causæ sæpe impedimento sunt, quo minus rem suam ipsi exsequi possint.

We must now remark, that a person may conduct an action either in his own name, or in that of another, as, for instance, if he is a procurator, a tutor, or a curator; but anciently, custom forbad one person conducting an action in the name of another, unless for the people, for freedom, or for a pupil. The *lex Hostilia* afterwards permitted an *actio furti* to be brought in the names of those who were prisoners in the hands of an enemy, of persons absent in the service of the state, or of those under the tutorship of such persons. But, as it was found to be exceedingly inconvenient, that one man should be prohibited from bringing or defending an action in the name of another, it by degrees became a practice to sue by procurators. For ill-health, old age, unavoidable journeys, and many other causes, continually prevent men from being able to attend personally to their own affairs.

GAI. iv. 82; D. l. 17. 123. pr.; D. iii. 3. 1. 2.

The old principle of Roman law was, that no one could represent another, and, with the exceptions noticed in the text, this principle was rigorously observed during the period of the actions of law.

By *agere pro populo* was meant bringing an *actio popularis* (*eam popularem actionem dicimus quæ suum jus populo tuetur*, D. xlvii. 23. 1); by *agere pro libertate* was meant becoming *assertor libertatis* for a slave (see Introd. sec. 96); and by *agere pro tutela*, bringing an action on behalf of a pupil.

Under the system of formulæ, the first step towards breaking through the old rule was the permitting a *cognitor* to be appointed. A *cognitor* was a person who was appointed by one of the parties to a suit to conduct it for him. The *cognitor* himself was not necessarily present when he was appointed, but it was necessary that the appointment should be made before the magistrate, in presence of the adversary, and by a certain form of words. For instance, a plaintiff speaking generally of his action would say, '*Quod ego tecum agere volo, in eam rem Lucium Titium cognitorem do*'. Other forms, adapted to other cases, are given in Gaius

(iv. 83). The name of the principal was inserted in the *intentio*, that of the representative in the *condemnatio*. (GAI. iv. 86.) In the case of a *cognitor*, the *actio judicati* was for or against the party to the suit.

The next step was to permit a procurator appointed by a mandate to conduct a suit, but at first he did so in his own name, for it was not till a later period of Roman law that a procurator could expressly represent his principal. He had accordingly, before Justinian, if plaintiff, to give security *ratam rem dominum habiturum*, and, if defendant, to give security *judicatum solvi*, as explained in the next Title. If a person offered to conduct a suit for another as *procurator voluntarius*, and could not produce an authorisation, he was allowed to act, not as mandatary, but as *negotiorum gestor*, if he acted in good faith, and gave security for ratification. (GAI. iv. 84.) The *actio judicati* lay for or against the procurator, and not the party. Subsequently, when the mandate was clear, or if the *mandator* was present and gave it, the procurator was considered as only representing the party, and the *actio judicati* was given to or against the party, not the procurator (*Vat. Frag.* 331), and this was extended to the case of the *negotiorum gestor*, who, although at first acting without a mandate, afterwards showed that the party approved what he did. (D. v. 1. 56.) Thus the procurator had taken the place of the *cognitor*, and it is only of the former that Justinian speaks.

1. Procurator neque certis verbis neque præsente adversario, immo plerumque ignorante eo constituitur: cuicumque enim permiseris rem tuam agere aut defendere, is procurator intellegitur.

1. A procurator is appointed without any particular form of words, nor is the presence of the adverse party required; indeed, it is generally done without his knowledge. For any one is considered to be your procurator whom you have allowed to bring or to defend an action for you.

GAI. iv. 84.

2. Tutores et curatores quemadmodum constituuntur, primo libro expositum est.

2. How tutors and curators are appointed has been already explained in the First Book.

GAI. iv. 85.

If the tutor, in appearing for the pupil, had merely discharged a duty forced upon him, the *actio judicati* (i.e. the action brought to enforce the sentence) was given to or against the pupil. If the tutor chose to appear for the pupil when he need have done nothing more than authorise the pupil to appear himself (*si se liti obtulit*), the *actio judicati* was given to or against the tutor. The case was the same as regards the curators of persons under the age of twenty-five. (D. xxvi. 7. 2. pr.; D. xxvi. 9. 5. pr.)

TIT. XI. DE SATISDATIONIBUS.

Satisdationum modus alius antiquitati placuit, alium novitas per usum amplexa est. Olim enim si in rem agebatur, satisdare possessor compellebatur, ut, si victus nec rem ipsam restitueret nec litis æstimationem, potestas esset petitori aut cum eo agendi aut cum fidejussoribus ejus. Quæ satisdatio appellabatur judicatum solvi: unde autem sic appellabatur, facile est intellegere. Namque stipulabatur quis, ut solveretur sibi, quod fuerit judicatum. Multo magis is, qui in rem actione conveniebatur, satisdare cogebatur, si alieno nomine judicium accipiebat. Ipse autem, qui in rem agebat, si suo nomine petebat, satisdare non cogebatur. Procurator vero si in rem agebat, satisdare jubebatur ratam rem dominum habiturum: periculum enim erat, ne iterum dominus de eadem re experiatur. Tutores et curatores eodem modo, quo et procuratores, satisdare debere, verba edicti faciebant. Sed aliquando his agentibus satisdatio remittebatur. Hæc ita erant, si in rem agebatur.

One system of taking securities prevailed in ancient times; custom has introduced another in modern times. Formerly, in a real action the possessor was compelled to give security, so that if he lost his cause, and did not either restore the thing itself, or pay the estimated value of it, the plaintiff might either sue him or his sureties: this species of security was termed *judicatum solvi*, nor is it difficult to understand why it was so called. For the plaintiff used to stipulate that what was adjudged to him should be paid. And with still greater reason was a person sued in a real action obliged to give security if he was defendant in the name of another. A plaintiff in a real action suing in his own name, was not obliged to give security; but a procurator bringing a real action had to give security that his acts would be ratified by the person for whom he acted; for there was a danger lest the person should bring a fresh action for the same thing. By the words of the edict, tutors and curators were bound to give security, as well as procurators, but it was sometimes dispensed with when they were the plaintiffs. Such was the practice with regard to real actions.

GAI. iv. 89, 90, 96, 98-100.

Judicatum solvi stipulatio tres clausulas in unum collatas habet: de re judicata, de re defendenda, de dolo malo. (D. xlvi. 7. 6.) There were three objects secured by the *cautio judicatum solvi*. It was promised (1) that the *litis æstimatio*, the amount of what was adjudged by the sentence, should be paid if the defendant should be condemned and should not give back the thing; (2) that the defendant should take all the proper steps in defending the action, and appear to receive the sentence of the judge; (3) that the defendant should use no *dolus malus*, should not, for instance, give back the thing, but give it in a state deteriorated by his fault. The object of the defendant, as well as the sureties, binding himself for the *litis æstimatio* (*aut cum eo agendi*, says the text, *aut cum fidejussoribus*), was to give the plaintiff his choice between an action *ex stipulatu*, which was often preferred, or one *ex judicato*, i.e. upon, or to enforce, the sentence. The object of making the defendant directly liable, by a stipulation, if he did not appear to defend the action, was to avoid having recourse to the less direct

mode in which the disobedience of the defendant to obey the magistrate's summons was made to benefit the plaintiff.

Satisdare possessor compellebatur. If the possessor would not give the *cautio judicatum solvi*, the possession, by means of an interdict (see Tit. 15. 3), was transferred to the plaintiff, if he was willing to give the security which his adversary refused to give.

Litis æstimatio. *Lis* here signifies the subject of the suit.

Multo magis si alieno nomine. This applied to the procurator in the days when he did not really represent the principal. The *cognitor* never gave security. The person really interested in the action was called *dominus litis;* when the procurator did not represent him, but came forward as if he was the *dominus litis*, it was necessary to guard against the real *dominus litis* bringing another action.

Tutors had probably to give security in all cases where they were the party defendant.

1. Sin vero in personam, ab actoris quidem parte eadem obtinebant, quæ diximus in actione, qua in rem agitur. Ab ejus vero parte, cum quo agitur, si quidem alieno nomine aliquis interveniret, omnimodo satisdabat, quia nemo defensor in aliena re sine satisdatione idoneus esse creditur. Quod si proprio nomine aliquis judicium accipiebat in personam, judicatum solvi satisdare non cogebatur.

1. In personal actions, on the part of the plaintiff, the same rules as to giving security were observed as in real actions. As to the defendant, if he appeared in the name of another, he was obliged to give security, for no one was considered a competent defendant in behalf of another unless he gave security; but any one who defended a personal action in his own name was not compelled to give the security *judicatum solvi*.

GAI. iv. 100-102.

If the defendant was a *cognitor*, the *dominus litis* gave security for him. (*Vat. Fragm.* 317.)

Gaius notices (iv. 102) that in some few exceptional instances, as if the action was one *judicati*, or if there was anything to make the credit of the defendant suspected, the defendant was obliged in personal actions to give security *judicatum solvi*.

2. Sed hæc hodie aliter observantur. Sive enim quis in rem actione convenitur sive personali suo nomine, nullam satisdationem propter litis æstimationem dare compellitur, sed pro sua tantum persona, quod in judicio permaneat usque ad terminum litis, vel committitur suæ promissioni cum jurejurando, quam juratoriam cautionem vocant, vel nudam promissionem vel satisdationem pro qualitate personæ suæ dare compellitur.

2. At present a different practice prevails. A defendant who is sued in his own name, either in a real or personal action, is not forced to give security for the payment of the estimated value of the thing sued for, but only for his own person, that is, that he will remain and abide the judgment until the end of the suit. For this security recourse may be had to the promise on oath of the party, when the security is called a *cautio juratoria*, or to his simple promise without oath, or to a *satisdatio*, according to the quality of the person.

C. xii. 1. 17.

In judicio permaneat. An earlier writer would probably have

pointed out that the *cautio* was given, when the parties were before the prætor, that the defendant would go before the *judex*. But in Justinian's time the distinction of *in jure* and *in judicio* was done away.

We gather from the text, that whereas under the old law the defendant would have had to give security both for the payment of the amount at which the subject-matter of the action was valued, and that he would appear to defend himself (*pro re defendenda*, or, as here, *in judicio permaneat*), under Justinian's legislation he did not engage at all for the former, and for the latter he did not necessarily give the security of a *fidejussor*, but, if a *vir illustris* (see Tit. 4. 10 note), only pledged himself by oath, or even by a simple promise. (C. xii. 1. 17.)

3. Sin autem per procuratorem lis vel infertur vel suscipitur, in actoris quidem persona, si non mandatum actis insinuatum est vel præsens dominus litis in judicio procuratoris sui personam confirmaverit, ratam rem dominum habiturum satisdationem procurator dare compellitur, eodem observando et si tutor vel curator vel aliæ tales personæ, quæ alienarum rerum gubernationem receperunt, litem quibusdam per alium inferunt.

3. But, where a suit is commenced or taken up by a procurator as plaintiff, if a mandate of appointment is not registered, or if the person who really brings the action does not himself appear before the judge to confirm the appointment of the procurator, then the procurator himself is obliged to give security that the person for whom he acts will ratify his proceedings. The same rule applies also if a tutor, curator, or any other person, who has undertaken to manage the affairs of another, brings an action through a third party.

4. Sin vero aliquis convenitur, si quidem præsens procuratorem dare paratus est, potest vel ipse in judicium venire et sui procuratoris personam per judicatum solvi satisdationis sollemnes stipulationes firmare vel extra judicium satisdationem exponere, per quam ipse sui procuratoris fidejussor existit pro omnibus judicatum solvi satisdationis clausulis. Ubi et de hypotheca suarum rerum convenire compellitur, sive in judicio promiserit sive extra judicium caverit, ut tam ipse quam heredes ejus obligentur: alia insuper cautela vel satisdatione propter personam ipsius exponenda, quod tempore sententiæ recitandæ in judicio invenietur, vel si non venerit, omnia dabit fidejussor, quæ condemnatione continentur, nisi fuerit provocatum.

4. As to the defendant, if he appears and wishes to appoint a procurator, he may either himself come before the judge, and there confirm the authority of the procurator, by giving with a solemn stipulation the caution called *judicatum solvi*, or he may give such a security elsewhere, and become himself the *fidejussor* of his own procurator, as to each clause of the caution *judicatum solvi*; and he is compelled to subject all his property to a *hypotheca*, whether he promises before the judge or not, and this obligation binds not only himself but his heirs. He must also give further security as to his own person, that he will himself appear at the time when judgment is given, or that, if he fails to do so, his *fidejussor* will pay all that is fixed to be paid by the sentence, unless the decision is appealed against.

For the *clausulæ* of the *cautio judicatum solvi*, see note on the introductory paragraph of this Title.

Alia insuper cautela. This was to insure that the *actio judicati* should be given against the real *dominus litis*.

5. Si vero reus præsto ex quacumque causa non fuerit et alius velit defensionem subire, nulla differentia inter actiones in rem vel personales introducenda, potest hoc facere, ita tamen ut satisdationem judicatum solvi pro litis præstet æstimatione. Nemo enim secundum veterem regulam, ut jam dictum est, alienæ rei sine satisdatione defensor idoneus intellegitur.

5. But if, from any cause, a defendant does not appear, and another person is willing to defend the action for him, he may do so (nor does it make any difference whether the action is real or personal), but he must give security *judicatum solvi* to the amount of what is at stake; for, according to the old rule of law we have just mentioned, no one is held a competent defendant for another without giving security.

6. Quæ omnia apertius et perfectissime e cottidiano judiciorum usu in ipsis rerum documentis apparent.

6. All this will be learned more clearly and fully by observation of the ordinary judicial proceedings in cases which may serve as examples.

7. Quam formam non solum in hac regia urbe, set et in omnibus nostris provinciis, etsi propter imperitiam aliter forte celebrantur, optinere censemus, cum necesse est omnes provincias caput omnium nostrarum civitatum, id est hanc regiam urbem, ejusque observantiam sequi.

7. We order that these rules shall be observed not only in this our royal city, but also in all our provinces, although other usages may be now adopted there through ignorance; for it is necessary that all the provinces should conform to the practice of our royal city, which is supreme above all others.

Tit. XII. DE PERPETUIS ET TEMPORALIBUS ACTIONIBUS, ET QUÆ AD HEREDES VEL IN HEREDES TRANSEUNT.

Hoc loco admonendi sumus, eas quidem actiones, quæ ex lege senatusve consulto sive ex sacris constitutionibus proficiscuntur, perpetuo solere antiquitus competere, donec sacræ constitutiones tam in rem quam personalibus actionibus certos fines dederunt: eas vero, quæ ex propria prætoris jurisdictione pendent, plerumque intra annum vivere (nam et ipsius prætoris intra annum erat imperium). Aliquando tamen et in perpetuum extenduntur, id est usque ad finem constitutionibus introductum, quales sunt hæ, quas bonorum possessori ceterisque, qui heredis loco sunt, accommodat. Furti quoque manifesti actio, quamvis ex ipsius prætoris jurisdictione proficiscatur, tamen perpetuo datur: absurdum enim esse existimavit, anno eam terminari.

We ought here to observe that the actions derived from a law, from a *senatusconsultum*, or from imperial constitutions, could formerly be exercised at any length of time, however great; until imperial constitutions assigned fixed limits both to real and to personal actions. Of the actions derived from the jurisdiction of the prætor, the greater part last only during one year, for this was the limit of the prætor's authority. Sometimes, however, these actions are perpetual, that is, last until the time introduced by the constitutions; such are those given to the *bonorum possessor* and to others standing in the place of the heir. The action *furti manifesti*, also, though proceeding from the jurisdiction of the prætor, is yet perpetual, for it seemed absurd to limit its duration to a year.

Gai. iv. 110, 111.

In the introductory note to Title 6, it has been said that we may ask as to actions, within what time they may be brought,

within what delay the proceedings must be finished, and what is the effect of a judgment in case of fresh proceedings being instituted. The second of these points is not noticed in the Institutes, the rules as to the period of finishing the suit having become obsolete. The third is treated of in the next Title, par. 5. We have now to consider the first, namely, how long the right of action lasted from its inception, i.e. from the time when the plaintiff could have brought an action.

Under the formulary system, the general rule was that actions arising from the law, a *senatusconsultum*, or constitutions, including an action arising out of the old civil law, were perpetual; that is, there was no limit to the time in which they could be brought. On the other hand, prætorian actions were annual, i.e. must be brought within an *annus utilis*, or year made up of days in which there was no obstacle to the plaintiff appearing in court, so that more than twelve months might be included. This time of a year was probably suggested by the duration of the prætor's office, but it had nothing to do with any one prætor being in office. It was merely a limited time during which the prætor, in creating an action, fixed that it must be brought.

To the rule that prætorian actions were annual, there were, however, exceptions of a very wide kind. The text mentions the actions given to a *bonorum possessor*, and to every one placed *in loco heredis*, and also the prætorian action for *furtum manifestum*, which was perpetual because it was a commutation of capital punishment. (GAI. iv. 111.) Further, all prætorian actions *rei persecutoriæ*, for the sake of the thing, including all actions on contracts for the simple value, were perpetual, unless the action was one not extending, but directly contradicting, the civil law, when it was annual. An example will show what was meant by this distinction. The *actio Publiciana* (Tit. 6. 4), given to extend the operation of usucapion, was perpetual, but the *actio rescissoria*, given to rescind usucapion (Tit. 6. 5), was annual. (D. xliv. 7. 35. pr.) We may, therefore, almost reverse the description of prætorian actions, and say that they were perpetual except when they were (1) penal (the *actio furti manifesti* being, however, perpetual), or (2) *rei persecutoriæ*, and in direct opposition to the civil law.

Sacræ constitutiones certos fines dederunt. In A.D. 424, Theodosius II. enacted that, as a general rule, actions, real or personal, should not be brought after a lapse of thirty years. (C. vii. 39. 3.) Subsequently the time was, in the case of some actions, as in that of an *actio hypothecaria*, when the thing hypothecated remained in the hands of the debtor, extended to forty years. (C. vii. 39. 7. 1.) The term *perpetua*, however, still continued to be applied to these actions, though, properly speaking, in the time of Justinian it meant nothing more than an action which could be brought within thirty or forty years, as opposed to those which could only be brought within a shorter period.

1. Non omnes autem actiones, quæ in aliquem aut ipso jure competunt aut a prætore dantur, et in heredem æque competunt aut dari solent. Est enim certissima juris regula, ex maleficiis pœnales actiones in heredem non competere, veluti furti, vi bonorum raptorum, injuriarum damni injuriæ. Sed heredibus hujusmodi actiones competunt nec denegantur, excepta injuriarum actione et si qua alia similis inveniatur. Aliquando tamen etiam ex contractu actio contra heredem non competit, cum testator dolose versatus sit et ad heredem ejus nihil ex eo dolo pervenerit. Pœnales autem actiones, quas supra diximus, si ab ipsis principalibus personis fuerint contestatæ, et heredibus dantur et contra heredes transeunt.

1. It is not all the actions allowed against any one by the law, or given by the prætor, that will equally be allowed or given against his heir. For it is a fixed rule of law, that penal actions arising from delicts are not allowed against the heir of the delinquent, as, for instance, the actions *furti, vi bonorum raptorum, injuriarum, damni injuriæ*. These actions are, however, given to heirs, and are not denied to them, with the exception of the action *injuriarum*, and others that may resemble it. Sometimes, however, even an action arising from a contract is not allowed against an heir; as when a testator has acted fraudulently and his heir has derived no advantage from the fraud. But penal actions, of which we have spoken above, if actually begun by the principals themselves, pass both to and against heirs.

GAI. iv. 112, 113; D. iv. 3. 17. 1; D. xliv. 7. 26, 58.

Although penal actions could not be brought against the heir of the wrongdoer in order to enforce the liability to a penalty, as the liability was personal to the wrongdoer, yet they could be brought against the heirs for the purpose of getting back from them anything by which they had received an advantage from the delict. (D. xliv. 7. 35. pr.)

Aliquando ex contractu actio contra heredem non competit. This is taken from Gaius, who means it to apply to the heirs of *adstipulatores, sponsores*, and *fidepromissores*, for their heirs were not bound; but it is difficult to say to what it could apply in the time of Justinian. It would also be supposed, from the text, that an action making a testator responsible for *dolus malus* did not ordinarily pass against his heirs, if his heirs were not benefited by the wrong he had committed; but there was only one case in which the action did not pass against his heirs, whether they had benefited by the *dolus malus* or not, namely, the action *in duplum* against a person who had been guilty of *dolus malus* with regard to a deposit placed in his custody under the pressure of an accidental misfortune (see Tit. 6. 23); and even in this case an *actio in simplum* passed against the heirs. (D. xvi. 3. 18.)

2. Superest, ut admoneamus, quod si ante rem judicatam is, cum quo actum est, satisfaciat actori, officio judicis convenit eum absolvere, licet judicii accipiendi tempore in ea causa fuisset, ut damnari debeat: et hoc est, quod ante vulgo dicebatur, omnia judicia absolutoria esse.

2. It remains that we should remark, that if, before the sentence, the defendant satisfies the plaintiff, the judge ought to absolve the defendant, although, from the time of the action being commenced before the magistrate, it was evident the defendant would be condemned. It is in this sense that in former times it was com-

monly said that in all actions the defendant might be absolved.

GAI. iv. 114.

If, after the formula was delivered, but before judgment was given, the defendant satisfied the plaintiff, a question had arisen, as we learn from Gaius (iv. 114), whether in all cases the judge was to absolve the defendant, or whether in actions *stricti juris* the judge was technically bound to go on and pronounce judgment. The Proculians thought that the condemnation was still to be made in actions *stricti juris*, though not in *bonæ fidei* actions or actions *in rem*. The Sabinians held that the defendant should be absolved in all actions, and it is the opinion of the Sabinians that Justinian confirms.

TIT. XIII. DE EXCEPTIONIBUS.

Sequitur, ut de exceptionibus dispiciamus. Comparatæ sunt autem exceptiones defendendorum eorum gratia, cum quibus agitur: sæpe enim accidit, ut, licet ipsa actio, qua actor experitur, justa sit, tamen iniqua sit adversus eum, cum quo agitur.

It now follows that we should speak of exceptions. They have been introduced as a means of defence for those against whom an action is brought. For it often happens that the action of the plaintiff, although in itself well founded, is yet unjust as regards the person against whom it is brought.

GAI. iv. 115, 116.

Exceptions belonged properly to the system of formulæ only. Under that system the prætor or other magistrate who pronounced on the right, *qui jus dicebat*, decided whether, on the statement of facts, the plaintiff had a right to an action. If he had, the parties were sent to the judge. But though the plaintiff might have a right to an action, the defendant might have some ground to urge why, in the particular instance, the action should be defeated; and if the action *in factum* was not *bonæ fidei*, i.e. if it was *stricti juris*, *arbitraria*, or penal, it was necessary that this ground should be distinctly stated by the defendant to the prætor. Thus the statement was incorporated in the formula sent to the judge, and was called the *exceptio*; it excepted, or took away from the power of the action. (See Introd. sec. 104.) The judge was bound by the instructions he received in the *intentio*. He could take notice of no reason urged by the defendant why the action should fail, if the only question submitted to him by the prætor was whether the plaintiff had a good ground of action. It was necessary that the prætor should also expressly instruct him to inquire whether the action, however well grounded, ought not to be defeated.

For instance, supposing an action was brought on a stipulation, the formula would run *Si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere*. The only question which the *judex* could have to decide would be, was the stipulation made or not? If it was, the right of the plaintiff to have a

sentence in his favour was indisputable. But supposing the prætor went on to add an exception, which was always negative, and say *Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat*, then a further inquiry would have to be made: was there any fraud on the part of the creditor which made it unjust that he should recover in the action?

The defendant, in making an exception, was not supposed to admit the truth of the plaintiff's statement. (D. xliv. 1. 9.) The plaintiff had first to prove his *intentio*, and unless he did so the action failed. Supposing he proved it to the satisfaction of the *judex*, it was then for the defendant to prove his exception. He affirmed the facts on which the exception rested, and he must prove them; he was in his turn the attacking party. *Reus in exceptione actor est*. (D. xliv. 1. 1.)

In actions *bonæ fidei*, as we have already said (see Tit. 6. 28), exceptions were never used; for here the judge was bound by the character of the action to examine into all the circumstances, and only to condemn the defendant if justice demanded he should do so. The action itself was said to imply any exception that could be set up. (D. xxx. 84. 5.)

In the time of Justinian there were, properly speaking, no such things as exceptions. The word came to mean any defence other than a denial of the subsistence of the right of action, which was urged before the magistrate by the defendant.

1. Verbi gratia si metu coactus aut dolo inductus aut errore lapsus stipulanti Titio promisisti, quod non debueras promittere, palam est, jure civili te obligatum esse, et actio, qua intenditur dare te oportere, efficax est: sed iniquum est, te condemnari, ideoque datur tibi exceptio metus causa aut doli mali aut in factum composita ad impugnandam actionem.

1. For instance, if forced by fear inveigled by fraud, or fallen into a mistake, you promise Titius in a stipulation that which you did not owe him, it is evident that, according to the civil law, you are bound, and the action, in which it is maintained that you ought to give, is validly brought. Yet it is unjust that you should be condemned; and, therefore, to repel the action, you have given you the exception *metus causa*, or *doli mali*, or one made to suit the circumstances.

D. xliv. 4. 4. 16. 33.

Errore lapsus, i.e. not a mistake as to the thing forming the subject of the stipulation, for such a mistake would make the stipulation void; but a mistake in the apprehension of some fact which if the defendant had known rightly, he would not have entered into the stipulation. (See Bk. iii. Tit. 19. 23.)

The *exceptio metus causa* ran thus: *Si in ea re nihil metus causa factum est*. (D. xliv. 4. 4. 33.) The *exceptio doli mali* thus: *Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat*. (D. xliv. 4. 2. 1; Gai. iv. 119.) We may remark that the former is general (fear inspired by any one whomsoever), the latter personal (the fraud of *Aulus Agerius*), and that the *exceptio doli mali* relates not only to the character of the action at the particular time when the obligation was formed, but also to its

subsequent character, *neque factum sit neque fiat.* A claim might be perfectly fair in the first instance, and afterwards become only partially so, or even wholly unfair. For instance, the real owner of an estate might claim it, and then find that the possessor, having improved it during the time he held it, is entitled to compensation. If the owner refuses the compensation, his claim, in itself fair, becomes, in the way he urges it, unfair.

In factum composita, i.e. shaped so as to raise the question whether a statement of a particular fact was or was not true. Some particular fact is submitted by the prætor to the *judex*, instead of such a general inquiry as whether the plaintiff has been guilty of fraud. For instance, to use the example given in the Digest (xlv. 1. 22), the inquiry directed to be made might be whether the plaintiff has not made the defendant believe that the subject of stipulation, which is made of brass, was made of gold.

The *exceptio in factum composita* was thus, like the *actio in factum concepta*, opposed to one *in jus concepta*. For instance, the *exceptio doli mali*, which was *in jus concepta*, not only raised a question of fact, but made it requisite that the *judex* should affix a certain character to the acts of the parties. It may be observed that this general exception *doli mali* would always answer every purpose which could be gained by using an exception *in factum composita;* for any particular fact which, if stated as an exception and proved, would furnish a bar to the action, would be taken notice of under the exception *doli mali*. But the magistrate would not always allow an exception *doli mali* to be inserted when he would give permission to employ one *in factum composita;* for infamy was attached to a plaintiff against whom an exception *doli mali* was proved; and when the plaintiff stood to the defendant in any such near relation as that of patron or ascendant, the magistrate would not allow an exception to be used which would have any further consequence than to protect the defendant. (D. xliv. 4. 4. 16.) The instances of exceptions in the following paragraphs are all instances of exceptions *in factum*.

2. Idem juris est, si quis quasi credendi causa pecuniam stipulatus fuerit neque numeravit. Nam eam pecuniam a te petere posse eum certum est: dare enim te oportet, cum ex stipulatu tenearis: sed quia iniquum est eo nomine te condemnari, placet, exceptione pecuniæ non numeratæ te defendi debere, cujus tempora nos, secundum quod jam superioribus libris scriptum est, constitutione nostra coartavimus.

2. It is the same, if any one should stipulate with you for the repayment of money he is to lend you, and then does not pay to you the sum borrowed; in such a case he could certainly demand from you the amount you have engaged to repay him, and you are bound to give it, for you are tied by the stipulation. But as it would be unjust that you should be condemned in such an action, it has been thought right you should have the defence of the exception *pecuniæ non numeratæ*. The time within which this exception can be used, has, as we have said in a former Book, been shortened by our constitution.

GAI. iv. 116; C. iv. 30. 14.

Quasi credendi causa, i.e. had made the defendant promise to pay a sum, as if he, the plaintiff, were going to lend the sum to the defendant.

It will be remembered that, in this exception, the burden of proof was on the plaintiff, instead of, as in other exceptions, on the defendant, and then it must be pleaded within originally one year and then five years, a term reduced by Justinian to two years. (See Bk. iii. Tit. 21.)

3. Præterea debitor si pactus fuerit cum creditore, ne a se peteretur, nihilo minus obligatus manet, quia pacto convento obligationes non omnimodo dissolvuntur: qua de causa efficax est adversus eum actio, qua actor intendit 'si paret eum dare oportere'. Sed quia iniquum est contra pactionem eum damnari, defenditur per exceptionem pacti conventi.

3. Again, the debtor who has agreed with his creditor that payment shall not be demanded from him, still remains bound. For an agreement is not a mode by which obligations are always dissolved. This action, therefore, in which the *intentio* runs, 'If it appears that he ought to give,' may be validly brought against him; but as it would be unjust that he should be condemned in contravention of the agreement, he may use in his defence the exception *pacti conventi.*

GAI. iv. 116.

Obligations formed *re* or *verbis* could not be dissolved by a simple pact. As the contract was a subsisting one, an exception was necessary. The exception *pacti conventi* ran thus: *Si inter Aulum Agerium et Numerium Negidium non convenit, ne ea pecunia peteretur.* (GAI. iv. 119.)

4. Æque si debitor deferente creditore juraverit, nihil se dare oportere, adhuc obligatus permanet; sed quia iniquum est, de perjurio quæri, defenditur per exceptionem jurisjurandi. In his quoque actionibus, quibus in rem agitur, æque necessariæ sunt exceptiones: veluti si petitore deferente possessor juraverit, eam rem suam esse, et nihilo minus eandem rem petitor vindicet: licet enim verum sit, quod intendit, id est rem ejus esse, iniquum est tamen, possessorem condemnari.

4. So, too, if the debtor, when the creditor challenges him to swear, affirms on oath that he ought not to give anything, he still remains bound. But as it would be unjust to examine whether he has perjured himself, he is allowed to defend himself with the exception *jurisjurandi.* In actions *in rem,* these exceptions are equally necessary: for instance, if the possessor, on being challenged by the claimant, swears that the property is his, and yet the plaintiff still persists in his real action. For the claim of the plaintiff might be well founded, and yet it would be unjust to condemn the possessor.

D. xii. 2. 9. pr. and 1; D. xii. 2. 3. 1; D. xii. 2. 11. 1.

The *exceptio jurisjurandi* was only necessary when the question whether the defendant had accepted the oath when offered him was disputed. If it was acknowledged, the prætor would not give an action at all. (D. xii. 2. 3. pr.) The oath terminated the right of the plaintiff to an action, being looked on as a sort of compromise by which the action was settled; *jusjurandum speciem*

transactionis continet, majoremque habet auctoritatem quam res judicata. (D. xii. 2. 2.)

5. Item si judicio tecum actum fuerit sive in rem sive in personam, nihilo minus ob id actio durat et ideo ipso jure postea de eadem re adversus te agi potest: sed debes per exceptionem rei judicatæ adjuvari.

5. Again, if an action real or personal has been brought against you, not the less because it has been so brought does the action endure, and, in strict law, an action might still be brought against you for the same object, but you are to be protected by the exception *rei judicatæ.*

GAI. iv. 106, 107.

Under the system of the actions of law, if a cause had once been decided, no further action could again be brought on the same grounds (GAI. iv. 108); but this was not the case under the prætorian system. To understand the effect of a previous action having been brought under the prætorian system, we must notice the distinction drawn by Gaius in his Fourth Book between *judicia legitima* * and *judicia imperio continentia* (iv. 103-109). *Judicia legitima,* i.e. proceedings founded on the old *jus civile,* were those in an action given in the city of Rome, or within the first milestone round the city, between Roman citizens, and tried by a single judge. *Judicia imperio continentia,* i.e. proceedings measured by the authority of the prætor, were those in an action given out of Rome, or tried by *recuperatores,* or by a single judge, if the judge or one or both parties was a *peregrinus,* or were *peregrini. Judicia imperio continentia* were only in full force during the time of office of the magistrate who gave the formula, and therefore the plaintiff who subsequently brought an action for the second time had to be met with an exception. With respect to *judicia legitima,* a further distinction is to be made. If they were *in rem* or *in factum,* the nature of these actions prevented the *litis contestatio* in their case operating in the way of a novation (see Book iii. Tit. 29. 3 note); and therefore, if a fresh action was brought, the defendant had to repel it by the exception *rei judicatæ.* Accordingly we may say, in brief, that under the prætorian system none but *judicia legitima in personam,* having an *intentio juris civilis,* extinguished the right of action, and therefore in all other cases an exception was necessary.

In the time of Justinian these distinctions had disappeared, and therefore he says generally that the *res judicata* produces an exception. It was to have the same force as it had formerly had in the case of *judicia imperio continentia,* and not that it had received in *judicia legitima.* Whether the action was real or personal, as the text informs us, the action still subsisted, and, no novation having taken place, a second action could only be repelled by an exception. But, practically speaking, under the system of *judicia extraordinaria,* as the judge did not receive instructions from a magistrate, and was not bound within the limits of a for-

* For reason of this distinction see SOHM's *Institutes,* p. 165.

mula, the distinction between the *res judicata* operating as a bar or as an exception was a very immaterial one.

In order that a *res judicata* should be available either as a bar or an exception, it was necessary that there should have been, in the former action, the same thing as the subject-matter of the litigation, the same quantity, the same right, the same ground of action, the same parties. *Cum quæritur hæc exceptio noceat necne, inspiciendum est an idem corpus sit, quantitas eadem, idem jus: et an eadem causa petendi, et eadem conditio personarum—quæ nisi omnia concurrunt, alia res est.* (D. xliv. 2. 12-14.)

Gaius also mentions the *exceptio rei in judicium deductæ*, i.e. that the case was already before the tribunal, as where one of two promissors (*duo rei promittendi*) having been sued, the other if sued could say that the case was already in the way of adjudication, having reached the stage of the *litis contestatio*, and might be ended within the appointed time, i.e. within eighteen months if it was a *judicium legitimum*, or within the duration of the power of the magistrate if it was *imperio continens*. See introductory note to Tit. 6. (GAI. iv. 106, 107.)

Litis contestatio. It may be convenient here to notice what was meant by the *litis contestatio* in the time of Justinian. Under the system of extraordinary procedure there was no longer that distinction of the proceedings which had obtained under the formulary system according as they were *in jure* (before the magistrate) or *in judicio* (before the judge). The *litis contestatio* was, in the formulary system, the last step in the proceedings before the magistrate. When he appointed the judge, the rights of the parties were fixed as they were at that epoch. Under the system of extraordinary procedure the same magistrate heard the case throughout. (See Introd. sec. 105, 111.) The epoch, so precise under the formulary system, for fixing the rights had now no place. For many purposes, however, it was necessary that some epoch should be fixed; and the epoch chosen was when the magistrate began to take cognisance of the cause by having the case for the plaintiff stated before him (C. iii. 9); and the expression *litis contestatio* was borrowed to denote the consequences of this epoch having arrived. For example, if the action was for a farm, the condition of the farm (*causa*) was taken to be that in which the farm was at the moment when the judge began to take cognisance of the action. But in many respects the whole effects of the *litis contestatio* were prevented from operating. We have already had three examples: 1. In Bk. ii. Tit. 6. 13 (note) we have seen that *usucapio* was interrupted by an action, and that this interruption took place, in the time of Justinian, not when the stage of the judge taking cognisance of the cause was reached, but by the plaintiff commencing proceedings. 2. In Bk. iii. 26. 6 (note) we have seen that Justinian prevented the *litis contestatio* operating so as to place the *fidejussor* in a different position from that of the *mandator*. 3. In Bk. iii. Tit. 29. 3 (note) we have seen that the

litis contestatio had, under the formulary system, the effect of extinguishing obligations giving rise to *judicia legitima in personam;* but this was not the case under Justinian, and therefore, in discussing novation (Bk. iii. Tit. 29. 3), all reference to the extinction of obligations is omitted, and in the text we have the general rule laid down that the action endures, and must be repelled by an exception if again brought.

6. Hæc exempli causa rettulisse sufficiet. Alioquin quam ex multis variisque causis exceptiones necessariæ sint, ex latioribus digestorum seu pandectarum libris intellegi potest.

6. The above examples of exceptions may suffice. It may be seen in the larger work of the Digest or Pandects how numerous and how different are the causes which make exceptions necessary.

7. Quarum quædam ex legibus vel ex his, quæ legis vicem obtinent, vel ex ipsius prætoris jurisdictione substantiam capiunt.

7. Some of these exceptions are derived from laws, and from other enactments having the force of law, or from the jurisdiction of the prætor.

GAI. iv. 118.

Ex legibus; such as the exception *nisi bonis cesserit* (see Tit. 14. 4), relative to the cession of the debtor's goods, under the *lex Julia.*

Ex his quæ legis vicem obtinent, i.e. *senatusconsulta* and constitutions. The exception under the rescript of Hadrian, permitting the employment of an exception *doli mali* when a plaintiff neglected to notice a counter-claim (see Tit. 6. 39), may serve as an example.

8. Appellantur autem exceptiones aliæ perpetuæ et peremptioræ, aliæ temporales et dilatoriæ.

8. Exceptions, again, may be classed as either perpetual and peremptory, or temporary and dilatory.

D. xlvi. 1. 3; GAI. iv. 120.

The duration according to which exceptions are said to be *perpetuæ* or *temporales,* is the length of time in which they can be used by the defendant if he has occasion, not the length of time during which their effect continues if they are employed.

All *exceptiones perpetuæ* were necessarily *peremptoriæ;* if found to be justified by the facts, they set the matter in litigation at rest for ever. All *exceptiones temporales* were necessarily *dilatoriæ;* they did but defer the decision of the matter in question till the expiration of a certain time.

9. Perpetuæ et peremptoriæ sunt, quæ semper agentibus obstant et semper rem, de qua agitur, peremunt: qualis est exceptio doli mali et quod metus causa factum est et pacti conventi, cum ita convenerit, ne omnino pecunia peteretur.

9. Those are perpetual and peremptory which always present an obstacle to the demand, and cut away for ever the ground on which it is brought; as, for instance, the exception *doli mali,* that *metus causa,* and that *pacti conventi,* when it has been agreed that no demand for the money shall ever be made.

D. xliv. 1. 3: GAI. iv. 121.

An act might be used for ever as an exception; and yet if an action was brought grounded on it, that action might possibly have to be brought within a certain time. For instance, if fraud or violence had been used in the making of a contract, the exception would be good whenever an action was brought on the contract; but the person injured could only bring an *actio doli* or *metus causa* within a limited time. Hence it came to be said that such things were *temporalia ad agendum, perpetua ad excipiendum*. (See D. xliv. 4. 5. 6.)

10. Temporales atque dilatoriæ sunt, quæ ad tempus nocent et temporis dilationem tribuunt: qualis est pacti conventi, cum convenerit, ne intra certum tempus ageretur, veluti intra quinquennium. Nam finito eo tempore non impeditur actor rem exsequi. Ergo hi, quibus intra tempus agere volentibus objicitur exceptio aut pacti conventi aut alia similis, differre debent actionem et post tempus agere: ideo enim et dilatoriæ istæ exceptiones appellantur. Alioquin, si intra tempus egerint objectaque sit exceptio, neque eo judicio quidquam consequerentur propter exceptionem nec post tempus olim agere poterant, cum temere rem in judicium deducebant et consumebant, qua ratione rem amittebant. Hodie autem non ita stricte hæc procedere volumus, sed eum, qui ante tempus pactionis vel obligationis litem inferre ausus est, Zenonianæ constitutioni subjacere censemus, quam sacratissimus legislator de his, qui tempore plus petierunt, protulit, ut et inducias, quas, sive ipse actor sponte indulserit vel natura actionis continet, contempserat, induplum habeant hi, qui talem injuriam passi sunt, et post eas finitas non aliter litem suscipiant, nisi omnes expensas litis antea acceperint, ut actores, tali pœna perterriti, tempora litium doceantur observare.

10. Those are temporary and dilatory which present an obstacle for a certain time and procure delay. Such is the exception *pacti conventi*, when it has been agreed that no action shall be brought for a certain time, as, for instance, for five years; when once this period has elapsed, the plaintiff is not prevented from demanding the thing. Those, therefore, who seek to bring the action before the expiration of the time, and are repelled by the exception *pacti conventi*, or any similar one, ought to put it off and to bring it after the time has elapsed; hence these exceptions are termed dilatory. If plaintiffs have brought the action before the expiration of the time, and been repelled by the exception, they will not gain anything by the action they bring, because of the exception; and, formerly, they would not have been able again to bring an action on the expiration of the time, because they had rashly brought their claim before a judge, and so used up their right to bring an action, and lost all they could claim. But at the present day we do not wish to proceed so rigorously; any one who shall venture to bring an action before the time fixed by the agreement or obligation shall be subject to the dispositions of the constitution of Zeno, published by that legislator of most pious memory with respect to those who, in regard to time, ask more than is due to them. Consequently, the delay which the plaintiff has disregarded, whether he himself has voluntarily accorded it, or whether it results from the nature of the action, shall be doubled for the benefit of those who have sustained such a wrong; and, even after the expiration of the time, these persons shall not be obliged to defend the action unless they have been first reimbursed for all the expenses of the former action, that a penalty so heavy may teach plaintiffs

to have due regard to the delays that are to elapse before actions are brought.

GAI. iv. 122, 123; C. iii. 10. 1.

Alia similis. Gaius gives, as an instance, the *exceptio litis dividuæ*, given to repel a plaintiff who broke up into two actions his remedy for a single thing, and sued within the same prætorship for the part he did not include in his first action. Gaius, in the Digest, defines dilatory exceptions as those *quæ non semper locum habent, sed evitari possunt.* (D. xliv. 1. 3.)

Zenonianæ constitutioni. See Tit. 6. 33.

11. Præterea etiam ex persona dilatoriæ sunt exceptiones: quales sunt procuratoriæ, veluti si per militem aut mulierem agere quis velit: nam militibus nec pro patre vel matre vel uxore nec ex sacro rescripto procuratorio nomine experiri conceditur: suis vero negotiis superesse sine offensa disciplinæ possunt. Eas vero exceptiones, quæ olim procuratoribus propter infamiam vel dantis vel ipsius procuratoris opponebantur, cum in judiciis frequentari nullo perspeximus modo, conquiescere sancimus, ne, dum de his altercatur, ipsius negotii disceptatio proteletur.

11. There are also dilatory exceptions by reason of the person; such are those objecting to a procurator; as, for instance, if a plaintiff wishes to have his cause conducted by a soldier or woman, for soldiers cannot be procurators even for their father, or mother, or wife, not even by virtue of an imperial rescript; but they may conduct their own affairs without any breach of discipline. As to the exceptions formerly opposed to procurators on account of the infamy either of the person appointing the procurator, or of the procurator himself, since we found that they were no longer used in practice, we have enacted that they shall be abolished, that no discussion as to their effect may prolong the course of the action itself.

D. xliv. 1. 3; C. ii. 13. 7, 9.

The exception to the procurator as an improper person only produced a delay; directly the plaintiff appointed a proper person as procurator, the action proceeded.

The *infamia* was that produced by being condemned in certain actions, as in the *actio tutelæ, depositi, pro socio*, &c.

After noticing exceptions, Gaius notices prescriptions, which originally had been limitations of the action inserted on behalf of the plaintiff or defendant. (Introd. sec. 104.) We have had an instance of the one inserted for the protection of the defendant in the *præscriptio longi temporis* (Bk. ii. Tit. 6. pr. note); but by the time of Gaius all prescriptions on behalf of the defendant were ranked among exceptions. Prescriptions on behalf of the plaintiff still remained where it was to the interest of the plaintiff that not all his right, but only so much of it as had given rise to an existing liability, should be sued on, so that he might not be barred from suing when other liabilities came into existence. (GAI. iv. 130-137.)

TIT. XIV. DE REPLICATIONIBUS.

Interdum evenit, ut exceptio, quæ prima facie justa videatur, inique noceat. Quod cum accidit, alia allegatione opus est adjuvandi actoris gratia, quæ replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis. Veluti cum pactus est aliquis cum debitore suo, ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est ut petere creditori liceat: si agat creditor et excipiat debitor, ut ita demum condemnetur, si non convenerit, ne eam pecuniam creditor petat, nocet ei exceptio; convenit enim ita, etiamque nihilo minus hoc verum manet, licet postea in contrarium pacti sunt. Sed quia iniquum est, creditorem excludi, replicatio ei dabitur ex posteriore pacto convento.

Sometimes an exception which at first sight seems just, is really unjust. In this case, to place the plaintiff in a right position, it is necessary there should be another allegation, termed a replication, because it unfolds and resolves the right given by the exception. For example, supposing a creditor has agreed with a debtor not to demand payment, and then makes an agreement to the contrary; that is, that he may demand payment; if, when the creditor brings his action, the debtor uses the exception, alleging that he ought only to be condemned if his creditor is not under an agreement not to demand payment, this exception presents an obstacle to the creditor. For so it was agreed, and it still remains true that this agreement was made, although a contrary agreement was afterwards made. But as it would be unjust to deprive the creditor of his remedy, he will be permitted to use a replication founded on the subsequent agreement.

GAI. iv. 126.

All that has been said on the use and nature of exceptions is applicable to replications, which are but exceptions to an exception. (D. xliv. 1. 22. 1.)

It is to be remarked that there could not be an *exceptio doli mali* to an *exceptio doli mali*. If the plaintiff had been guilty of fraud, it could not strengthen his right of action that the defendant had also been guilty. (D. xliv. 4. 4. 13.)

1. Rursus interdum evenit, ut replicatio, quæ prima facie justa sit, inique noceat. Quod cum accidit, alia allegatione opus est adjuvandi rei gratia, quæ duplicatio vocatur.

1. The replication, in its turn, may, at first sight, seem just, and yet be really unjust. In this case, to aid the defendant, it is necessary there should be a further allegation, termed a *duplicatio*.

GAI. iv. 127.

2. Et si rursus ea prima facie justa videatur, sed propter aliquam causam inique actori noceat, rursus allegatione alia opus est, qua actor adjuvetur, quæ dicitur triplicatio.

2. And if, again, the *duplicatio* may seem just, but is for some reason really unjust to the plaintiff, there is wanted, to aid the plaintiff, a still further allegation, termed a *triplicatio*.

GAI. iv. 128.

3. Quarum omnium exceptionum usum interdum ulterius quam diximus, varietas negotiorum intro-

3. The great diversity of affairs has made it requisite to carry still further than we have mentioned the use of

ducit: quas omnes apertius ex latiore digestorum volumine facile est cognoscere.

these exceptions. A clearer knowledge of them all may be obtained by reading the fuller work of the Digest.

GAI. iv. 129.

4. Exceptiones autem, quibus debitor defenditur, plerumque accommodari solent etiam fidejussoribus ejus: et recte, quia, quod ab his petitur, id ab ipso debitore peti videtur, quia mandati judicio redditurus est eis, quod hi pro eo solverint. Qua ratione et si de non petenda pecunia pactus quis cum reo fuerit, placuit, proinde succurrendum esse per exceptionem pacti conventi illis quoque, qui pro eo obligati essent, ac si et cum ipsis pactus esset, ne ab eis ea pecunia peteretur. Sane quædam exceptiones non solent his accommodari. Ecce enim debitor si bonis suis cesserit et cum eo creditor experiatur, defenditur per exceptionem 'nisi bonis cesserit': sed hæc exceptio fidejussoribus non datur, scilicet ideo quia, qui alios pro debitore obligat, hoc maxime prospicit, ut, cum facultatibus lapsus fuerit debitor, possit ab his, quos pro eo obligavit, suum consequi.

4. The exceptions given for the protection of the debtor are also for the most part given in behalf of his *fidejussores*, and rightly so; for what is demanded from them is really demanded from the debtor, because by the *actio mandati* he will be forced to repay them what they have paid for him. Hence, if a creditor agrees with his debtor not to demand payment, the exception *pacti conventi* may be employed by those who are bound for him, exactly as if the agreement not to demand payment had been made with them personally. There are, however, some exceptions not allowed them; for instance, if the debtor has made a cession of his property, and the creditor sues him, he may protect himself by the exception *nisi bonis cesserit;* but this exception is not allowed to *fidejussores.* For in taking sureties for the payment of a debt, what the creditor principally looks to is recovering what is owed him from the sureties, in case of the insolvency of the principal.

D. xliv. 1. 19; D. ii. 14. 32.

Exceptions were divided into *rei cohærentes*, which affected the right to claim, and *personæ cohærentes*, which only protected the debtor himself. As an instance of an *exceptio cohærens rei* may be given an *exceptio doli mali*, or a general pact not to sue. As an instance of an *exceptio cohærens personæ* may be given that mentioned in the text, where the debtor was protected by having given up all his property, or a particular pact not to sue the debtor personally. Generally the *fidejussors* of the defendant could use the exceptions which he could have used; but this was not always, as the text points out, true of those *personæ cohærentes*, as in the case of the exception *nisi bonis cesserit*.

TIT. XV. DE INTERDICTIS.

Sequitur, ut dispiciamus de interdictis seu actionibus, quæ pro his exercentur. Erant autem interdicta formæ atque conceptiones verborum, quibus prætor aut jubebat aliquid

We have now to treat of interdicts and the actions which supply their place. Interdicts were certain formulæ by which the prætor ordered or forbad something to be done; they

fieri aut fieri prohibebat. Quod tum maxime faciebat, cum de possessione aut quasi possessione inter aliquos contendebatur.

were chiefly employed in disputes as to possession or quasi-possession.

GAI. iv. 138, 139.

An interdict was a decree or edict of the prætor made in a special case. The prætor published a general edict stating the leading principles on which he would act. But in certain cases he would make an edict applicable only to particular persons and particular things. Instead, for instance, of referring the party applying to him for relief to the general rule of law that one man should not be allowed to interfere with the watercourses of another, he made an edict that A should not interfere with the watercourses of B. According to the circumstances of the case such a command might be either positive or negative; and though, as is remarked in paragr. 1, the word *interdictum* was considered to apply more properly to a negative command only, it was, as a matter of usage, applied to all such special edicts indifferently; and Justinian seems to suppose that *interdicere* does not mean, as Gaius assumes, to forbid, but *inter duos dicere,* to decide between two parties. (See paragr. 1.)

If the person to whom the special edict was addressed obeyed its directions, no further proceedings were necessary; if he asserted that he had not done wrong, the prætor allowed an action to be brought grounded on the interdict. A sketch of the mode in which the proceedings grounded on an interdict were conducted will be found in the notes to paragr. 8.

There was always something of a public character in the reasons which induced the prætor to grant an interdict. He adopted it as a speedy and sure remedy in cases where danger was threatened to objects which public policy is especially interested to preserve uninjured, such as public roads and waters, burial-grounds, or sacred places; and though interdicts were granted where the quarrel was entirely between private parties, it was originally, perhaps, only when the subject of dispute was such as to render a breach of the public peace the probable result, unless the matter was set at rest by the summary interposition of legal authority. If, for instance, it was a possession or quasi-possession that was disputed, it might be feared that the claimant would adopt force to eject the actual occupier, that force would be met by force, and the public peace be broken; and the limitation of the time—one year—within which, as we shall see (paragr. 6 note), interdicts had in many cases to be applied for, seems to connect the acts giving rise to them with delicts. (POSTE, *Gai.* pp. 650, 651.) This public character attaching to interdicts may suggest that they were originally given to protect public, not private, interests. Niebuhr (*Hist. Rom.* vol. ii. 149, Eng. Trans.) and Savigny (*Possess.* Bk. iv. 44) think that in the private occupancy of the *ager publicus* may be seen an interest so little protected otherwise, and calling so precisely for some such aid as the interdict, that it can hardly be doubted that the early use of

interdicts was directed to meet the exigencies of this particular case. Anyhow, as the civil law did not deal with possession apart from ownership, a remedy became necessary when the prætors recognised possession, and, after the prætorian system was fully established, a character of settled law was imposed upon the mode of giving interdicts by the prætor announcing in his edict that he would grant a particular interdict under particular circumstances. Interdicts were given, as the text informs us, to protect not only the possession of corporeal things, but the quasi-possession of servitudes. (See Bk. ii. Tit. 3. 4 note.)

When the system of granting interdicts was fully formed, an interdict was ordinarily the mere prelude to an action, which was tried like any other action, and the process was not more summary than in other actions (see note on paragr. 8); and even before the introduction of the system of *extraordinaria judicia*, interdicts had become, probably, less frequently used, there being a tendency to go direct to the action grounded on them, and to do away with the interdict as a preliminary step. In the time of Justinian persons who under the prætorian system would have applied for an interdict, brought an action. (See paragr. 8.) In conducting this action, the magistrate would be greatly guided by the old law relating to interdicts; but otherwise the subject of interdicts was one with which the law of the Lower Empire had very little to do.

1. Summa autem divisio interdictorum hæc est, quod aut prohibitoria sunt aut restitutoria aut exhibitoria. Prohibitoria sunt, quibus vetat aliquid fieri, veluti vim sine vitio possidenti vel mortuum inferenti, quo ei jus erit inferendi, vel in loco sacro ædificari, vel in flumine publico ripave ejus aliquid fieri, quo pejus navigetur. Restitutoria sunt, quibus restitui aliquid jubet, veluti bonorum possessori possessionem eorum, quæ quis pro herede aut pro possessore possidet ex ea hereditate, aut cum jubet ei, qui vi possessione fundi dejectus sit, restitui possessionem. Exhibitoria sunt, per quæ jubet exhiberi, veluti eum, cujus de libertate agitur, aut libertum, cui patronus operas indicere velit, aut parenti liberos, qui in potestate ejus sunt. Sunt tamen qui putant, proprie interdicta ea vocari, quæ prohibitoria sunt, quia interdicere est denuntiare et prohibere: restitutoria autem et exhibitoria proprie decreta vocari: sed tamen optinuit, omnia interdicta appellari, quia inter duos dicuntur.

1. The principal division of interdicts is, that they are prohibitory, restitutory, or exhibitory. Prohibitory interdicts are those by which the prætor forbids something to be done, as, for example, to use force against a person in lawful possession, or against one who carries a dead body to a spot where he has a right to carry it, or to build on a sacred place, or to do anything in a public river, or on its bank, which may impede the navigation. Restitutory interdicts are those by which the prætor orders something to be restored, as, for instance, when he orders to be restored to the *bonorum possessor* the possession of the goods of an inheritance possessed by another as heir or as possessor, or when he orders the possession of land to be restored to the person who has been violently expelled from the possession of it. Exhibitory interdicts are those by which the prætor orders to exhibit; for instance, to exhibit the person whose freedom is being questioned, or the freedman to whom his patron wishes to notify the services due from him, or to exhibit to the father the children in his power. Some, how-

ever, think that the term interdict ought, strictly speaking, to be applied to those which are prohibitory, because *interdicere* means 'to denounce, to prohibit,' while those that are restitutory or exhibitory ought to be called *decreta*. But usage has applied the word interdict to all alike, as they are all given between two parties.

GAI. iv. 139, 140, 142; D. xliii. 1. 1.

The formula of many of the interdicts most ordinarily in use is preserved to us in the Digest. It would take up too much space to give many of these at length. One or two examples of each kind must suffice.

The formula of the prohibitory interdict generally ended with the words *veto* or *vim fieri veto*. That forbidding nuisances in public ways ran thus:—

In via publica itinereve publico facere, immittere quid, quo ea via idve iter deterius sit, fiat, veto. (D. xliii. 8. 2. 20.)

That forbidding interruption in the use of a burial-ground ran thus:—

Quo quave illi (the person protected) *inferre invito te* (the person against whom the interdict was granted) *jus est, quominus illi eo eave mortuum inferre et ibi sepelire liceat, vim fieri veto.* (D. xi. 8. 1. pr.) Other prohibitory interdicts may be found relating to sacred places (D. xliii. 6. 1. pr.), tombs (D. xi. 8. 1. 5), navigation (D. xliii. 12. 1. pr.).

Restitutory interdicts ran, for example, thus:—

Quod in flumine publico ripave ejus factum, sive quid in flumen ripamve ejus immissum habes, si ob id aliter aqua fluit atque uti priore œstate fluxit, restituas. (D. xliii. 13. 11.)

Restituere is used in a very wide sense, as it includes not only, as in this example, putting back things into the state they were before, and giving back possession, but giving possession to a person who had not had possession.

Of exhibitory interdicts, which were ordinarily used as the preliminary of a vindication, we may take as a specimen that *de libero homine exhibendo*, granted to make any one who had a freeman in his custody produce him, and thus render it impossible that he should be illegally retained in his custody. It ran thus:—

Quem liberum dolo malo retines, exhibeas. (D. xliii. 29. 1. pr.)

2. Sequens divisio interdictorum hæc est, quod quædam adipiscendæ possessionis causa comparata sunt, quædam retinendæ, quædam reciperandæ.

2. The second division of interdicts is, that they are given some to acquire, some to retain, and others to recover possession.

GAI. iv. 143; D. xliii. 1. 2. 3.

As interdicts were mainly applied to questions of the possessory rights of private persons, those interdicts which distinctly

referred to such possession are here classed together. But they fall under the heads of the first division. Interdicts *retinendæ possessionis* were prohibitory; interdicts *adipiscendæ* or *reciperandæ possessionis* were restitutory.

3. Adipiscendæ possessionis causa interdictum accommodatur bonorum possessori, quod appellatur 'quorum bonorum,' ejusque vis et potestas hæc est, ut, quod ex his bonis quisque, quorum possessio alicui data est, pro herede aut pro possessore possideat, id ei, cui bonorum possessio data est, restituere debeat. Pro herede autem possidere videtur, qui putat se heredem esse: pro possessore is possidet, qui nullo jure rem hereditariam vel etiam totam hereditatem sciens, ad se non pertinere, possidet. Ideo autem adipiscendæ possessionis vocatur interdictum, quia ei tantum utile est, qui nunc primum conatur adipisci rei possessionem: itaque si quis adeptus possessionem amiserit eam, hoc interdictum ei inutile est. Interdictum quoque, quod appellatur Salvianum, adipiscendæ possessionis causa comparatum est eoque utitur dominus fundi de rebus coloni, quas is pro mercedibus fundi pignori futuras pepigisset.

3. To acquire possession an interdict is given to the *bonorum possessor*, termed *Quorum bonorum*, of which the effect is to compel the person possessing, as heir or possessor, any of the goods of which the possession is given to another, to make restitution to that person as the *bonorum possessor*. A person is said to possess as heir, who thinks himself to be heir, and as possessor, who, without any right, and knowing that it does not belong to him, possesses a part or the whole of an inheritance. It is said of this interdict, that it is given to acquire possession, because it is only available for a person who wishes to gain, for the first time, possession of a thing. If, then, a person who has gained possession loses it, he cannot avail himself of this interdict. There is, too, another interdict given to acquire possession, viz. the *interdictum Salvianum*, to which an owner of land has recourse to enforce his right over the things belonging to the farmer, which the farmer has pledged as a security for his rent.

GAI. iv. 144, 147.

The interdict *Quorum bonorum* ran thus:—

Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides, possideresve si nihil usucaptum esset, quod quidem dolo malo fecisti ut desineres possidere, id illi restituas. (D. xliii. 2. 1. pr.) Although the interdict was only given when the *bonorum possessor* had never before had possession, yet it was restitutory, a term used very widely, as has been observed in the note to paragr. 1, and the word *restituas* appears in its terms. *Restituas*, therefore, must be used as meaning 'to give up,' not 'to give back'.

The use of this interdict, which could be brought only with respect to the inheritance as a *universitas*, not with respect to the particular things composing it (D. xliii. 2. 1. 1), was to secure the possession to those whom the prætor treated as having a right to the inheritance, but who had not a right recognised by the civil law. Not being heirs, properly so called, they could not bring a real action for the inheritance. (See Bk. iii. Tit. 9. pr.) It will be observed from the formula that the interdict might be used against the person possessing *pro herede* or *pro possessore*, although the time of usucapion had run in his favour, and against such

a person, if, having possessed, he had, through *dolus malus* on his part, ceased to possess. The person possessing *pro possessore*, i.e. without any allegation of title, is sometimes spoken of as *prædo*. (See Tit. 6. 28 note.)

We must not confound the *interdictum Salvianum* with the *actio Serviana* (see Tit. 6. 7), but it was probably only a step to that action, and may have fallen into disuse when the *actio Serviana* was established as a means of redress for the creditor. The *interdictum Salvianum* was not given to every mortgage creditor, but only to the owner of a rural estate, as a means of getting possession of the goods of the occupier of the estate which had been pledged for the rent. Probably the interdict was granted even if the goods had passed into the hands of a third party. (D. xliii. 33. 1; but see C. viii. 9. 1.) Gaius mentions two other interdicts coming under this head, one given to *bonorum emptores*, and one to *sectores*, or purchasers of public goods (iv. 145, 146).

4. Retinendæ possessionis causa comparata sunt interdicta 'uti possidetis' et 'utrubi,' cum ab utraque parte de proprietate alicujus rei controversia sit et ante quæritur, uter ex litigatoribus possidere et uter petere debeat. Namque nisi ante exploratum fuerit, utrius eorum possessio sit, non potest petitoria actio institui, quia et civilis et naturalis ratio facit, ut alius possideat, alius a possidente petat. Et quia longe commodius est possidere potius quam petere, ideo plerumque et fere semper ingens existit contentio de ipsa possessione. Commodum autem possidendi in eo est, quod, etiamsi ejus res non sit, qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio: propter quam causam, cum obscura sint utriusque jura, contra petitorem judicari solet. Sed interdicto quidem 'uti possidetis' de fundi vel ædium possessione contenditur, 'utrubi' vero interdicto de rerum mobilium possessione. Quorum vis et potestas plurimam inter se differentiam apud veteres habebat: nam 'uti possidetis' interdicto is vincebat, qui interdicti tempore possidebat, si modo nec vi nec clam nec precario nanctus fuerat ab adversario possessionem, etiamsi alium vi expulerat aut clam abripuerat alienam possessionem aut precario rogaverat aliquem, ut sibi possidere liceret: 'utrubi' vero interdicto is vincebat, qui majore parte ejus anni nec vi nec clam nec precario ab adversario

4. To retain possession there are given the interdicts *uti possidetis* and *utrubi*, when in a dispute as to the ownership of a thing, the question first arises, which of the parties ought to be possessor and which plaintiff. For, unless it is first determined to which the possession belongs, it is impossible to shape the real action, as law and reason both require that one party should possess, and the other bring his claim against him. And as it is much more advantageous to possess than to claim the thing, there is generally a keen dispute as to the possession itself. The advantage of possession consists in this, that even if the thing does not really belong to the possessor, yet, if the plaintiff does not prove himself to be the owner, the possessor still remains in possession, and, therefore, when the rights of the parties are doubtful, it is customary to decide against the claimant. The interdict *uti possidetis* applies to the possession of land and buildings, the interdict *utrubi* to that of moveables. There were formerly great differences in their effects; for in the interdict *uti possidetis* he prevailed who was in possession at the time of the interdict, provided that he had not acquired possession from his adversary by force or clandestinely, or as a concession; but it made no difference if he had acquired it from any one else, by forcibly expelling him, secretly depriving him of possession, or obtaining from him possession as a concession. In the interdict *utrubi*, on the contrary,

possidebat. Hodie tamen aliter observatur; nam utriusque interdicti potestas, quantum ad possessionem pertinet, exæquata est, ut ille vincat et in re soli et in re mobili, qui possessionem nec vi nec clam nec precario ab adversario litis contestationis tempore detinet.

he prevailed, who during the greater part of the preceding year had had the possession without having obtained it as against his adversary by force, clandestinely, or as a concession. At the present day, it is different, for the two interdicts have the same effect as regards possession, so that, whether the thing claimed is an immoveable or a moveable, he prevails, who, at the time of the *litis contestatio*, is in possession, without having obtained it as against his adversary by force, clandestinely, or as a concession.

GAI. iv 148-152; D. vi. 1. 24; D. xliii. 17. 1; D. xliii. 31; C. iv. 19. 2.

The interdict *uti possidetis* ran thus:—

Uti eas ædes, quibus de agitur, nec vi, nec clam, nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto. (D. xliii. 17. 1. pr.)

It was granted to defend the possession of all immoveables, except *cloacæ*, which were expressly excepted by the prætor's edict. The word *ædes* in the text of the interdict is only an example.

By possessing *precario* is meant possessing at the will of another, possession having been requested from him. (D. xliii. 26. 1. pr.) When the person from whom the possession had been extorted wished to do so, he could always resume it; and hence the word *precarius* came to mean uncertain. Perhaps the origin of *precaria possessio* was the interest that clients had in a portion of the *ager publicus*, which their patron might permit them to use, and which they were bound to restore immediately if their patron demanded it back.

The words *alter ab altero* are inserted, because it would be no ground for disturbing the possession that had been obtained *vi*, *clam*, or *precario*, unless it had been so obtained from the other litigant party.

It was necessary that application should be made for this interdict within a year after the security of the possession had been threatened. (D. xliii. 17. 1. pr.) It did not signify how it had been threatened. The text only refers to the case of an action being brought to dispute it, but the interdict would be granted in whatever way the possession had been attacked.

The interdict *utrubi* ran thus:—

Utrubi hic homo quo de agitur majore parte hujusce anni fuit, quominus is eum ducat, vim fieri veto. (D. xliii. 31. pr.)

The example is taken from the case of the disputed possession of a slave, but the interdict applied to the case of all moveables. This interdict was considered one *retinendæ possessionis*, although, before Justinian applied the same rule as in *uti possidetis*, as it was granted to the person who had possessed during the greater part of the preceding year, it might happen that it was granted to a person who had not the possession at the exact time it was

granted, but who had possessed the thing during more months in the year than the person who happened to be in possession at the end of the year.

5. Possidere autem videtur quisque non solum, si ipse possideat, sed et si ejus nomine aliquis in possessione sit, licet is ejus juri subjectus non sit, qualis est colonus et inquilinus: per eos quoque, apud quos deposuerit quis aut quibus commodaverit, ipse possidere videtur: et hoc est, quod dicitur, retinere possessionem posse aliquem per quemlibet, qui ejus nomine sit in possessione. Quin etiam animo quoque retineri possessionem placet, id est ut, quamvis neque ipse sit in possessione neque ejus nomine alius, tamen si non relinquendæ possessionis animo, sed postea reversurus inde discesserit, retinere possessionem videatur. Adipisci vero possessionem per quos aliquis potest, secundo libro exposuimus. Nec ulla dubitatio est, quin animo solo possessionem adipisci nemo potest.

5. A person is considered to possess not only when he himself possesses, but also if any one is in possession in his name, although not a person in his power, as the tenant of a farm or building. He may also possess through a depositary or a borrower, and this it is that is meant by saying that a person may retain possession by any other who is in possession in his name. Moreover, it is held that possession may be retained by mere intention only, that is, that although a person is not in possession himself, nor is any one else in his name, yet, if it is not with any intention of abandoning the thing, but with the intention of returning again to it, that he has placed himself at a distance from it, he is considered still to retain the possession. Through whom possession may be acquired, we have already explained in the Second Book. But it most certainly can never be acquired by mere intention only.

GAI. iv. 153.

In the introductory note to Bk. ii. Tit 6. pr., the distinction has been pointed out between *civilis possessio*, that is possession *bona fide* and *ex justa causa*, which could be transmuted by usucapion into ownership, and *naturalis possessio*, which again is divided into *possessio*, where, although there is not possession such as will ripen by usucapion, there is still possession as a matter of fact, coupled with the intention of treating the thing as if the possessor were the owner, and *in possessione esse*, where the person has the *detentio*, but not the *animus possidendi*. *Civilis possessio* and *naturalis possessio* with the intention of ownership were protected by these possessory interdicts, whereas the being merely in possession was not. This paragraph points out (1) that one person may be in possession while another is the possessor, and that the first is not, while the second is, entitled to the interdicts; and (2) that a possessor may sometimes possess only with the *animus* without being actually on the spot possessing. An instance given by Paulus is that of a man who possesses a mountain pasture, and leaves it when the season for its use is over, with the intention of returning. (*Sent.* v. 2. 1.) But the mere intention to possess as owner, without the physical fact of detention having ever taken place, was of no avail.

6. Reciperandæ possessionis causa solet interdici, si quis ex possessione

6. To recover possession an interdict is given in case any one has been

fundi vel ædium vi dejectus fuerit: nam ei proponitur interdictum 'unde vi,' per quod is, qui dejecit, cogitur ei restituere possessionem, licet is ab eo, qui vi dejecit, vi vel clam vel precario possidebat. Sed ex sacris constitutionibus, ut supra diximus, si quis rem per vim occupaverit, si quidem in bonis ejus est, dominio ejus privatur, si aliena, post ejus restitutionem etiam æstimationem rei dare vim passo compellitur. Qui autem aliquem de possessione per vim dejecerit, tenetur lege Julia de vi privata aut de vi publica: sed de vi privata, si sine armis vim fecerit, sin autem cum armis eum de possessione expulerit, de vi publica. Armorum autem appellatione non solum scuta et gladios et galeas significari intellegimus, sed et fustes et lapides.

expelled by violence from the possession of land or a building. He has then given him the interdict *unde vi*, by which he who has expelled him is forced to restore to him the possession, although the person to whom the interdict is given has himself taken by force, clandestinely, or as a concession, the possession from the person who has expelled him. But, as we have said above, the imperial constitutions provide that if any one seizes on a thing by violence, he shall lose the ownership of it, if it is a part of his own goods, and if it belongs to another, he shall not only restore it, but, in addition, pay to the person who has sustained the injury the amount at which the thing is estimated. Moreover, a person who has expelled by violence another from his possession, is liable under the *lex Julia de vi publica seu privata:* for private violence, if his violence was exercised without the use of arms; for public violence, if the expulsion from possession was made by armed force. Under the term arms are included not only shields, swords, and helmets, but clubs and stones.

GAI. iv. 154, 155; D. xlviii. 7. 7; D. l. 16. 41; C. viii. 4. 7.

The interdict *unde vi* ran thus:—

Unde tu illum vi dejecisti, aut familia tua dejecit, de eo, quœque ille tunc ibi habuit, tantummodo intra annum, post annum de eo quod ad eum qui vi dejecit pervenerit, judicium dabo. (D. xliii. 16. 1. pr.)

Formerly a distinction was made in granting this interdict, according to the degree of violence used. If it had been ordinary violence (*vis quotidiana*), the interdict was only granted if the possession had not been obtained *vi*, *clam*, or *precario*, with respect to the adversary (GAI. iv. 154), and could only be obtained within a year; but if *vis armata* had been employed, the interdict was granted in all cases. (CIC. *Epist.* xv. 16.) This difference had ceased long before the time of Justinian, and apparently before the time when the interdict assumed the shape in which we now find it in the Digest, by which, as will be seen, possession was given, within a year, of the thing as it then was; after a year, only of the thing as it came into the hands of the dispossessor.

The interdict *unde vi* only applied to immoveables (D. xliii. 16. 1. 6); but the constitution of Valentinian, Theodosius, and Arcadius, A.D. 389, referred to in the text (and in Tit 2. 1), protected moveables as well as immoveables. (C. viii. 4. 7.)

The *lex Julia de vi* is treated of in Tit. 18. 8.

Possession could be recovered by *uti possidetis* and *utrubi* as

well as by *unde vi*, and it was by *utrubi* that, previously to the constitution above mentioned, possession of moveables was recovered. But the interdict *unde vi* was in some respects more advantageous than *uti possidetis*. (1) It gave a remedy against the dispossessor, even if he was no longer in possession (D. xliii. 16. 1. 42); (2) it gave, if brought within a year, the *fructus* from the time of the ejectment, not as *uti possidetis* merely from the commencement of proceedings (D. xliii. 16. 1. 40); and (3) it was not, if the *vis* had been *armata*, or after the distinction between the characters of the violence employed had been done away, barred by the vices of the possession of the applicant for the interdict; (4) it applied not only to immoveables, but to any moveables thereon. (D. xliii. 16. 1. 6.)

There were other interdicts under the head of *reciperandæ possessionis*—that *de precario* and that *de clandestina possessione* (D. xliii. 26. 2. pr.; D. x. 3. 7. 5); but little is known of them.

7. Tertia divisio interdictorum hæc est, quod aut simplicia sunt aut duplicia. Simplicia sunt, in quibus alter actor, alter reus est: qualia sunt omnia restitutoria aut exhibitoria: namque actor est, qui desiderat aut exhiberi aut restitui, reus is, a quo desideratur, ut restituat aut exhibeat. Prohibitoriorum autem interdictorum alia simplicia sunt, alia duplicia. Simplicia sunt, veluti cum prohibet prætor in loco sacro vel in flumine publico ripave ejus aliquid fieri (nam actor est, qui desiderat, ne quid fiat, reus, qui aliquid facere conatur): duplicia sunt veluti 'uti possidetis' interdictum et 'utrubi'. Ideo autem duplicia vocantur, quia par utriusque litigatoris in his condicio est nec quisquam præcipue reus vel actor intellegitur, sed unusquisque tam rei quam actoris partem sustinet.

7. The third division of interdicts is, that they are either simple or double. Those are simple in which one person is plaintiff and the other defendant, as is the case in all that are restitutory or exhibitory. For he is the plaintiff who wishes that a thing shall be exhibited or restored, and he is defendant against whom the claim is made. But of prohibitory interdicts some are simple, some double: simple, as, for instance, when the prætor forbids anything to be done in a sacred place, or in a public river, or on its banks; for he is plaintiff who wishes that the thing should not be done, and he is defendant who wishes to do it: double, as in the case of the interdicts *uti possidetis* and *utrubi;* and these interdicts are called double, because in them the possession of each party is equal, for neither can be said to be properly plaintiff or defendant, but each is at once plaintiff and defendant.

GAI. iv. 156-160.

Duplicia sunt, veluti uti possidetis interdictum et utrubi. These interdicts here and in Gaius (GAI. iv. 160) are, seemingly, only adduced as examples, but we know of no others having the same character. Compare the actions *familiæ erciscundæ*, *communi dividundo*, and *finium regundorum* (see Introd. sec. 103).

8. De ordine et veteri exitu interdictorum supervacuum est hodie dicere: nam quotiens extra ordinem jus dicitur, qualia sunt hodie omnia judicia, non est necesse reddi interdictum, sed perinde judicatur sine

8. Of the process and effect of interdicts in former times it would be now superfluous to speak. For whenever the jurisdiction is extraordinary, as is the case now in all actions, there is no necessity for an interdict; for

interdictis, atque si utilis actio ex causa interdicti reddita fuisset.

judgment is given without interdicts, exactly as if a *utilis actio* had been given in pursuance of an interdict.

C. viii. 1. 3.

From the Institutes of Gaius (iv. 161 *et seq.*) we gather a general notion of the manner in which the proceedings on an interdict were conducted. But the text of Gaius is, in this part, very imperfect and difficult to understand, and as the whole process was obsolete in the time of Justinian, a very short sketch of the proceedings must suffice here.

The parties were made to appear *in jure* exactly in the same way when an interdict was to be applied for as when an action was to be brought. The prætor heard the statement of the party who made the application, and if the adversary confessed the truth of the statement, the prætor announced his decree at once, and had it executed, if necessary, by the strong arm of the law (*manu militari*, D. vi. 1. 68). If the defendant asserted that he had not done wrong, the prætor gave an action based upon the interdict, to ascertain whether the facts were as the plaintiff, in applying for the interdict, alleged; that is, the *intentio* of the formula was the language of the interdict put as a hypothetical case. The interdict would run,—*Hoc vel illud te facere veto:* the *intentio*, *Si hoc vel illud A. A. fecerit* (*condemna*, &c.). The parties bound themselves by a *sponsio* and *restipulatio* in a penal sum, which the defendant was to pay if he was in the wrong, and to receive if he was not. But this practice, which was always adopted when the interdict was prohibitory, was probably gradually abandoned when the interdict was restitutory or exhibitory; and in these cases, in order to compel the actual performance of the act ordered by the prætor, an action was given with a *formula arbitraria*, so that the *judex* might issue a preparatory order to the defendant, and, if it was not complied with, might make him pay the amount of all damage sustained (*quanti ea res erit*), or would compel him, at least at the date when Ulpian wrote (D. vi. 1. 68), to restore the thing if in his possession. As to *actiones arbitrariæ* see note on Tit. 6. 31.

Tit. XVI. DE PŒNA TEMERE LITIGANTIUM.

Nunc admonendi sumus, magnam curam egisse eos, qui jura sustinebant, ne facile homines ad litigandum procederent: quod et nobis studio est. Idque eo maxime fieri potest, quod temeritas tam agentium quam eorum, cum quibus agitur, modo pecuniaria pœna, modo jurisjurandi religione, modo metu infamiæ coercetur.

We may here observe, that the authors and preservers of our law have always sought most anxiously to hinder men from engaging too recklessly in law-suits, and it is what we ourselves desire also. And the best method of succeeding in it is, to repress the rashness alike of plaintiffs and of defendants, sometimes by a pecuniary penalty, sometimes by the sacred tie of an oath, sometimes by the fear of infamy.

Gai. iv. 174.

In the days of Gaius, the means of punishing persons who recklessly brought or defended a suit were more numerous. The plaintiff was restrained from recklessly bringing an action not only by being condemned in damages and costs, but (1) by an action of calumny—that is, the defendant could bring against a plaintiff who had sued him dishonestly an action by which the defendant could recover one-tenth of what the plaintiff had claimed, if by action, and one-fourth of what he had claimed, if by interdict (GAI. iv. 175); (2) by what was termed the 'contrary action' the unsuccessful plaintiff, although he had honestly brought his action, was made to pay a tenth or a fifth of what he claimed, but then it was only failing in a few special actions, such as that *injuriarum*, that exposed him to this risk (GAI. iv. 177); (3) by oath, i.e. by the defendant calling on him to swear to his *bona fides*, but if the defendant did this, he could not afterwards bring an action of calumny, or the contrary action (GAI. vi. 179); and (4) by *restipulatio*, i.e. by being called on to wager a sum to be lost if he failed, which was allowed in certain actions; this mode of proceeding excluded the three others previously mentioned. (GAI. iv. 180, 181.)

In the law as described by Gaius, the defendant was restrained from recklessly defending an action (1) by the *sponsio*, or wager that he had done all he was bound to do, allowed in certain actions (the *sponsio* and *restipulatio* made up the wager of the parties) (GAI. iv. 171); (2) in certain actions, as, for instance, for deposit in case of necessity, the penalty was double in case of denial (Tit. 6. 17), and all actions with a penalty are looked on by Gaius as restraining the defendant (iv. 171); (3) if the case was one where no restraint operated under these first two heads, the defendant was obliged to take an oath of *bona fides* (GAI. iv. 172); (4) certain actions carried infamy with them against the persons condemned. (GAI. iv. 182.)

1. Ecce enim jusjurandum omnibus, qui conveniuntur, ex nostra constitutione defertur: nam reus non aliter suis allegationibus utitur, nisi prius juraverit, quod putans, se bona instantia uti, ad contradicendum pervenit. At adversus infitiantes ex quibusdam causis dupli actio constituitur, veluti si damni injuriæ aut legatorum locis venerabilibus relictorum nomine agitur. Statim autem ab initio pluris quam simpli est actio veluti furti manifesti quadrupli, nec manifesti dupli: nam ex his causis et aliis quibusdam, sive quis neget sive fateatur, pluris quam simpli est actio. Item actoris quoque calumnia coercetur: nam etiam actor pro calumnia jurare cogitur ex nostra constitutione. Utriusque

1. And first, under our constitution, an oath is administered to all defendants. For the defendant is not admitted to state his defence until he has sworn that it is from a persuasion of the goodness of his own cause that he resists the demand of the plaintiff. In certain cases where the defendant denies liability an action for double the value is given; for instance, in the case of wrongful damage, or of legacies left to holy places. The action is from the very beginning for more than the single value in such cases as the action *furti manifesti*, where it is for the quadruple value, and that *furti nec manifesti*, where it is for the double. In these cases and in some others, whether the defendant denies or confesses, the action

etiam partis advocati jusjurandum subeunt, quod alia nostra constitutione comprehensum est. Hæc autem omnia pro veteris calumniæ actione introducta sunt, quæ in desuetudinem abiit, quia in partem decimam litis actorem multabat, quod nusquam factum esse invenimus: sed pro his introductum est et præfatum jusjurandum et ut improbus litigator etiam damnum et impensas litis inferre adversario suo cogatur.

is for more than the single value. The litigiousness of the plaintiff is also restrained, for he is obliged by our constitution to take the oath *de calumnia.* The advocates also of each party take an oath prescribed by another of our constitutions. All these formalities have been introduced to replace the old action *calumniæ*, which is fallen into disuse, for it subjected the plaintiff to a fine of the tenth of the value of the thing in dispute; but we have never known this penalty enforced. In its stead, there has, in the first place, been introduced the oath we have just mentioned; and, in the next place, a person who brings a groundless action is made to reimburse his adversary for all losses and expenses he has been put to.

GAI. iv. 173; C. ii. 59. 2; C. iii. 1. 13. 6; C. iii. 1. 14. 1.

For the terms of these oaths see C. ii. 59. 2; C. iii. 1. 14. 1.

2. Ex quibusdam judiciis damnati ignominiosi fiunt, veluti furti, vi bonorum raptorum, injuriarum, de dolo, item tutelæ, mandati, depositi directis, non contrariis, actionibus, item pro socio, quæ ab utraque parte directa est, et ob id quilibet ex sociis eo judicio damnatus ignominia notatur. Sed furti quidem aut vi bonorum raptorum aut injuriarum aut de dolo non solum damnati notantur ignominia, sed etiam pacti: et recte; plurimum enim interest, utrum ex delicto aliquis an ex contractu debitor sit.

2. In certain actions the person condemned becomes infamous, as in the actions *furti, vi bonorum raptorum, injuriarum, de dolo;* as also in the actions *tutelæ, mandati, depositi,* if direct, but not if contrary; and also in the action *pro socio*, which is direct, by whichever of the contracting parties it may be brought, and in which infamy is attached to whichever of these parties may be condemned. But in the actions *furti, vi bonorum raptorum, injuriarum*, and *de dolo*, it is not only those condemned that are branded with infamy, but also those who have made a compromise with their opponents; and rightly, for there is a great difference between being debtor by a delict, and by a contract.

GAI. iv. 182; D. iii. 2. 7.

Directis non contrariis. The reason is given by Ulpian: *In contrariis non de perfidia agitur sed de calculo, qui fere judicio solet dirimi.* (D. iii. 2. 6. 7.) *Contrariæ actiones* were such as those brought against the pupil, the mandator, or depositor by the tutor, mandatary, or depositary. There could be no reason why infamy should attach to a pupil who did not know the amount of the claims of the tutor, or to a depositor, who did not know the amount of the expenses to which the depositary had been put.

The consequences of infamy were to prevent the guilty person from being a witness, receiving any public honours, or bringing a public prosecution. We have also seen (Tit. 13. 11) that, previous

to the legislation of Justinian, a person declared infamous could not appear as procurator in the cause of another.

3. Omnium autem actionum instituendarum principium ab ea parte edicti proficiscitur, qua prætor edicit de in jus vocando: utique enim in primis adversarius in jus vocandus est, id est ad eum vocandus est, qui jus dicturus sit. Qua parte prætor parentibus et patronis, item liberis parentibusque patronorum et patronarum hunc præstat honorem, ut non aliter liceat liberis libertisque eos in jus vocare, quam si id ab ipso prætore postulaverint et impetraverint: et si quis aliter vocaverit, in eum pœnam solidorum quinquaginta constituit.

3. In bringing any action, the first thing is, to comply with that part of the edict in which the prætor treats of the *vocatio in jus.* For the defendant must always be summoned *in jus,* i.e. before the magistrate who has to pronounce the law. In this part of the edict the prætor shows such respect towards ascendants, patrons, and even towards the ascendants and children of patrons and patronesses, that children and freedmen cannot summon them *in jus,* unless they have first obtained permission from the prætor; and he subjects persons who summon them without having obtained the prætor's permission, to a penalty of fifty *solidi.*

GAI. iv. 183; D. ii. 4. 1; D. ii. 4. 4. 1; D. ii. 4. 24.

The earliest method of *vocatio in jus* was to seize on the defendant, and drag him before a magistrate. Afterwards the seizing became symbolical, and the plaintiff called some one to witness that the defendant had been seized, but would not come. (See Introd. sec. 93.)

TIT. XVII. DE OFFICIO JUDICIS.

Superest, ut de officio judicis dispiciamus. Et quidem in primis illud observare debet judex, ne aliter judicet, quam legibus aut constitutionibus aut moribus proditum est.

It remains to treat of the office of the judge. His first care ought to be, never to judge otherwise than according to the laws, the constitutions, or customary usage.

D. v. 1. 40. 1; D. xlviii. 10. 1. 3.

Judex qui contra sacras principum constitutiones, contrave jus publicum quod apud se recitatum est, pronunciat, in insulam deportatur. (PAUL. *Sent.* v. 25. 4.)

If the judge gave a sentence manifestly wrong, or if the sum was fixed in the condemnation by the prætor, and the judge condemned the defendant in a different sum (GAI. iv. 52), the sentence was treated as void without any appeal being necessary. If the judge was mistaken, as, for instance, in the mode in which he regarded some fact, an appeal was allowed, notice of which had to be given within two days (prolonged to ten days by Justinian in Nov. 23. 1) after the sentence, or three days if a procurator, and not the party himself, had conducted the suit. There seems to have been no system of appeals under the Republic, further than that one magistrate of equal or higher standing could veto

the acts of another. Under the Empire the emperor was the supreme judge of appeal, the technical term for an appeal to him being *relatio*. But Hadrian made the decisions on appeal of the Senate final (D. xlix. 2. 1. 2), and Constantine made those of the prætorian præfect (C. vii. 62. 19). The præfect of the city and the præsides of provinces sat as intermediate judges of appeal for Rome and the provinces respectively (C. vii. 62. 17 and 32). (See HUNTER, 885-889.)

1. Ideo si noxali judicio addictus est, observare debet, ut, si condemnandus videbitur dominus, ita debeat condemnare: 'Publium Mævium Lucio Titio decem aureis condemno aut noxam dedere'.

1. Consequently, if appointed to try a noxal action, he must observe, if he thinks the master ought to be condemned, that the proper form or condemnation is as follows: 'I condemn Publius Mævius to pay ten *aurei* to Lucius Titius, or to abandon the cause of the injury'.

D. xlii 1. 6. 1.

2. Et si in rem actum sit, sive contra petitorem judicavit, absolvere debet possessorem, sive contra possessorem, jubere eum debet, ut rem ipsam restituat cum fructibus. Sed si in præsenti neget se possessor restituere posse et sine frustratione videbitur tempus restituendi causa petere, indulgendum est ei, ut tamen de litis æstimatione caveat cum fidejussore, si intra tempus, quod ei datum est, non restituisset. Et si hereditas petita sit, eadem circa fructus interveniunt, quæ diximus intervenire in singularum rerum petitione. Illorum autem fructuum, quos culpa sua possessor non perceperit, in utraque actione eadem ratio pæne habetur, si prædo fuerit. Si vero bona fide possessor fuerit, non habetur ratio consumptorum neque non perceptorum: post inchoatam autem petitionem etiam illorum ratio habetur qui culpa possessoris percepti non sunt vel percepti consumpti sunt.

2. In a real action, if he determines against the claimant, he ought to absolve the possessor; if against the possessor, he ought to order the possessor to give up the thing itself together with the fruits. But if the possessor states that it is out of his power to give up the thing at once, and his request for delay seems honestly made, some indulgence should be accorded him; but he must first furnish a *fidejussor* to give security to the amount of the value of the thing in dispute, in case he should not restore it within the time allowed him. If an inheritance is claimed, the rules with regard to the fruits are the same as those we have laid down in the case of particular things. Of the fruits not gathered by the fault of the possessor, account is taken almost in the same way in both actions, when the possession is *mala fide*. The *bona fide* possessor has not to account for fruits, whether consumed or not gathered. But from the time when the claim is made, the possessor has to account for all fruits not gathered through his fault, or gathered and consumed.

D. vi. 1. 17. 1; D. vi. 1. 35. 1; D. vi. 1. 62. 1; C. iii. 32. 22.

What the words *eadem ratio pœne habetur* refer to is not easy to say. There do not seem to be any passages in the Digest which satisfactorily indicate any difference between the responsibilities of the *mala fide* possessor for fruits, according as the action was *in rem*, or was a *petitio hereditatis*.

Justinian here says that the position of a *bona fide* possessor

was the same in the case of an inheritance and of a particular object; for that in neither case was he answerable for fruits gathered and consumed. But this was not the case after a *senatusconsultum* made in the time of Hadrian (D. v. 3. 20. 6), which made the *bona fide* possessor of an inheritance answerable for all that he had profited by (D. v. 3. 28); and he was therefore answerable for the fruits he had consumed. Perhaps the text may be based on some passage in the writings of a jurist, who wrote before the *senatusconsultum* was made.

3. Si ad exhibendum actum fuerit, non sufficit, si exhibeat rem is, cum quo actum est, sed opus est, ut etiam causam rei debeat exhibere, id est ut eam causam habeat actor, quam habiturus esset, si, cum primum ad exhibendum egisset, exhibita res fuisset: ideoque si inter moras usucapta sit res a possessore, nihilo minus condemnabitur. Præterea fructuum medii temporis, id est ejus, quod post acceptum ad exhibendum judicium ante rem judicatam intercessit, rationem habere debet judex. Quod si neget is, cum quo ad exhibendum actum est, in præsenti exhibere se posse et tempus exhibendi causa petat idque sine frustratione postulare videatur, dari ei debet, ut tamen caveat, se restituturum: quod si neque statim jussu judicis rem exhibeat neque postea exhibiturum se caveat, condemnandus est in id, quod actoris intererat ab initio rem exhibitam esse.

3. In the action *ad exhibendum* it is not sufficient that the defendant exhibits the thing, but he must also exhibit his title to the thing, that is, he must give the claimant the same title as he would have had, if the thing had been exhibited immediately on the demand being made. If, therefore, during the delay, the possessor completes the usucapion of the thing, he will still be condemned. The judge ought also to make him account for the fruits of the intermediate time, that is, of the time elapsed between the granting the action *ad exhibendum* and the sentence. If the defendant in this action states that it is out of his power to make the exhibition immediately, and asks for time, and his request for delay seems honestly made, he should have time given him, but he must first give security that he will give the thing up. But if he neither exhibits the thing at once, upon the order of the judge, nor gives security for exhibiting it afterwards, he must be condemned in an amount equivalent to the interest of the claimant in having it exhibited immediately.

D. x. 4. 9. 5, 6; D. x. 4. 12. 4, 5.

4. Si familiæ erciscundæ judicio actum sit, singulas res singulis heredibus adjudicare debet et, si in alterius persona prægravare videatur adjudicatio, debet hunc invicem coheredi certa pecunia, sicut jam dictum est, condemnare. Eo quoque nomine coheredi quisque suo condemnandus est, quod solus fructus hereditarii fundi percepit aut rem hereditariam corrupit aut consumpsit. Quæ quidem similiter inter plures quoque quam duos coheredes subsequuntur.

4. In the action *familiæ erciscundæ*, he ought to adjudge each object to each heir separately, and if any one heir has more than his share adjudged him, the judge ought, as we have said above, to condemn him to pay his coheir a fixed sum as an equivalent. So, too, an heir ought to be condemned to make compensation to his coheirs, who has alone enjoyed the fruits of the land of the inheritance, or has damaged or consumed anything forming part of the inheritance. And these rules apply, whether the coheirs are two or more.

D. x. 2. 51. 1; D. x. 2. 52. 2.

As to the office of the judge in the three actions noticed in this and the two succeeding paragraphs, see Introd. sec. 103.

5. Eadem interveniunt et si communi dividundo de pluribus rebus actum fuerit. Quod si de una re, veluti de fundo, si quidem iste fundus commode regionibus divisionem recipiat, partes ejus singulis adjudicare debet et, si unius pars prægravare videbitur, is invicem certa pecunia alteri condemnandus est: quod si commode dividi non possit, vel homo forte aut mulus erit, de quo actum sit, uni totus adjudicandus est et is alteri certa pecunia condemnandus.

5. It is the same in the action *communi dividundo* for the division of a number of things. If there is only one object to be divided, for instance, a piece of land, the judge ought, if the land easily admits of division, to adjudge their respective shares to the several co-proprietors. And if one of them receives too large a share, the judge ought to order him to pay a sum of money as compensation to the other. If the thing is one that cannot be advantageously divided, as, for instance, a slave or mule, then the whole must be adjudged to one, and he must be condemned to pay a fixed sum as compensation to the other.

D. x. 2. 55; C. iii. 37. 3.

6. Si finium regundorum actum fuerit, dispicere debet judex, an necessaria sit adjudicatio. Quæ sane uno casu necessaria est, si evidentioribus finibus distingui agros commodius sit, quam olim fuissent distincti; nam tunc necesse est ex alterius agro partem aliquam alterius agri domino adjudicari: quo casu conveniens est, ut is alteri certa pecunia debeat condemnari. Eo quoque nomine damnandus est quisque hoc judicio, quod forte circa fines malitiose aliquid commisit, verbi gratia quia lapides finales furatus est aut arbores finales cecidit. Contumaciæ quoque nomine quisque eo judicio condemnatur, veluti si quis jubente judice metiri agros passus non fuerit.

6. In the action *finium regundorum* the judge ought to examine if the adjudication is necessary, and it is so only in one case, viz. if it would be advantageous that the boundaries should be more clearly marked than before. In that case it becomes necessary to adjudge to one party a portion of the field of the other, and consequently the person to whom it is adjudged ought to be condemned to pay a fixed sum as compensation to the other. In this action he ought also to be condemned who has fraudulently interfered with the boundaries, as, for instance, by secretly carrying off the boundary stones, or cutting down the trees that mark the limit. A person may be also condemned by this same action for contumacy, who, in defiance of the order of the judge, opposes the measurement of the fields.

D. x. 1, 2. 1; D. x. 1. 3; D. x. 1. 4. 3, 4.

7. Quod autem istis judiciis alicui adjudicatum sit, id statim ejus fit, cui adjudicatum est.

7. In these actions, anything adjudged becomes at once the property of the person to whom it is adjudged

TIT. XVIII. DE PUBLICIS JUDICIIS.

Publica judicia neque per actiones ordinantur nec omnino quidquam simile habent ceteris judiciis, de quibus locuti sumus, magnaque

Public prosecutions are not introduced by actions, and bear no resemblance to the other legal remedies of which we have been speaking. There

diversitas est eorum et in instituendis et in exercendis.

is a great difference between them both in the mode in which they are begun and in that in which they are carried on.

The subject of public prosecutions is foreign to a treatise which, like the Institutes, professes to treat only of private law. It is not noticed at all in the Institutes of Gaius, and is treated in a very cursory manner in this Title. For the comprehension of this Title, it will be sufficient to observe that, in the later times of the Republic and in the first years of the Empire, a series of laws was made, fixing the penalty to be attached to particular crimes, and prescribing the procedure to be employed in the trial. Many of these laws are briefly referred to in this Title; and it was the trials conducted under their provisions that alone received the name of *publica judicia*. Under the Empire, most of the crimes not coming under these special laws, and especially those provided against by a *senatusconsultum* or constitution, were judged by the prætor or *præfectus urbi* in a more summary method. The *judicium* was then said to be not *publicum*, but *extra ordinem;* and gradually the method of procedure prescribed by the law for the different *publica judicia* fell into desuetude, and nothing was retained of the special laws but the penalty they fixed (D. xlviii. 1. 8), the procedure being the same as in the *judicia extraordinaria.* (See Introduction, sec. 112.)

1. Publica autem dicta sunt, quod cuivis ex populo exsecutio eorum plerumque datur.

1. They are called public, because generally any citizen may institute them.

D. xxiii. 2. 43. 10.

There were certain persons excluded from the right of bringing a criminal accusation; for instance, women, unless the injury complained of was done to themselves or their near relations, persons below the age of puberty, persons made infamous by a judicial sentence, and persons so poor as not to possess fifty *aurei.* (D. xlviii. 2. 1, 8 and 10.) But, generally speaking, it was the right of any one to make a criminal charge, although he might be totally unconnected by any ties with the person who suffered from the crime.

2. Publicorum judiciorum quædam capitalia sunt, quædam non capitalia. Capitalia dicimus, quæ ultimo supplicio adficiunt vel aquæ et ignis interdictione vel deportatione vel metallo: cetera si qua infamiam irrogant cum damno pecuniario, hæc publica quidem sunt, non tamen capitalia.

2. Some public prosecutions are capital, some are not. We term capital those which involve the extreme punishment of the law, or the interdiction from fire and water, or deportation, or the mines. Those which carry with them infamy and a pecuniary penalty are public, but not capital.

D. xlviii. 1. 2.

3. Publica autem judicia sunt hæc. Lex Julia majestatis, quæ in eos, qui contra imperatorem vel rem publicam aliquid moliti sunt,

3. Public prosecutions are instituted under the following laws. The *lex Julia majestatis*, which subjects to its severe provisions all who attempt

suum vigorem extendit. Cujus pœna animæ amissionem sustinet et memoria rei et post mortem damnatur.

anything against the emperor or State. The penalty it inflicts is the loss of life, and the memory of the guilty is condemned even after his death.

D. xlviii. 4. 11.

The *lex Julia majestatis* was passed in the time of Julius Cæsar. (D. xliii. 4.)

Aliquid moliti sunt. The design, without any overt act, was enough to sustain the charge. (C. xi. 8. 5.)

Et post mortem. (See Bk. iii. Tit. 1. 5.)

4. Item lex Julia de adulteriis coercendis, quæ non solum temeratores alienarum nuptiarum gladio punit, sed etiam eos, qui cum masculis infandam libidinem exercere audent. Sed eadem lege Julia etiam stupri flagitium punitur, cum quis sine vi vel virginem vel viduam honeste viventem stupraverit. Pœnam autem eadem lex irrogat peccatoribus, si honesti sunt, publicationem partis dimidiæ bonorum, si humiles, corporis coercitionem cum relegatione.

4. Also the *lex Julia de adulteriis*, which punishes with death not only those who are guilty of adultery, but those also who give themselves up to works of lewdness with their own sex. The same law also punishes the seduction without violence of a virgin, or of a widow of honest character. The penalty upon offenders of honourable condition is the confiscation of half their fortune, upon those of low condition, corporal punishment and relegation.

D. xlviii. 5. 34.

The *lex Julia de adulteriis* belongs to the time of Augustus, about B.C. 17.

Gladio punit. The *lex Julia* only punished the guilty with confiscation of a portion of their property and relegation. (PAUL. *Sent.* ii. 26. 14.) Constantine affixed the graver penalty. (C. ix. 9. 31.)

5. Item lex Cornelia de sicariis, quæ homicidas ultore ferro persequitur vel eos, qui hominis occidendi causa cum telo ambulant. Telum autem, ut Gaius noster in interpretatione legis duodecim tabularum scriptum reliquit, vulgo quidem id appellatur, quod ab arcu mittitur, sed et omne significatur, quod manu cujusdam mittitur: sequitur ergo, ut et lapis et lignum et ferrum hoc nomine contineatur. Dictumque ab eo, quod in longinquum mittitur, a Græca voce figuratum, *ἀπὸ τοῦ τηλοῦ*: et hanc significationem invenire possumus et in Græco nomine: nam quod nos telum appellamus, illi *βέλος* appellant *ἀπὸ τοῦ βάλλεσθαι*. Admonet nos Xenophon; nam ita scripsit: *καὶ τὰ βέλη ὁμοῦ ἐφέρετο, λόγχαι, τοξεύματα, σφενδόναι, πλεῖστοι δὲ καὶ λίθοι.* Sicarii autem appellantur a sica, quod significat ferreum

5. Also the *lex Cornelia de sicariis* which strikes with the sword of vengeance murderers and those who for the purpose of killing a man go armed with a *telum*. By *telum*, according to the interpretation given by our Gaius in his commentaries on the Twelve Tables, is ordinarily meant anything that is shot from a bow, but it equally signifies anything sent from the hand. Thus, a stone, a piece of wood, or of iron, is included in the meaning of the term, for it merely implies something impelled to a distance, being derived from the Greek word *τηλοῦ*. And the corresponding word in Greek has the same signification, for what we call *telum* they call *βέλος*, from *βάλλεσθαι*, as we may learn from Xenophon, who says, 'they collected the weapons (*βέλη*)—spears, arrows, slings, and a great quantity of stones'. Assassins are called *sicarii* from *sica*, an iron knife.

cultrum. Eadem lege et venefici capite damnantur, qui artibus odiosis, tam venenis quam susurris magicis homines occiderunt vel mala medicamenta publice vendiderunt.

By the same law, poisoners are capitally condemned who by hateful arts use poisons or magic charms to kill men, or publicly sell hurtful drugs.

D. xlviii. 8. 1. pr. and 1; D. l. 16. 233. 2.

Lex Cornelia de sicariis, passed during the dictatorship of Sylla, B.C. 81.

6. Alia deinde lex asperrimum crimen nova pœna persequitur, quæ Pompeia de parricidiis vocatur. Qua cavetur, ut, si quis parentis aut filii aut omnino adfectionis ejus, quæ nuncupatione parricidii continetur, fata properaverit, sive clam sive palam id ausus fuerit, nec non is, cujus dolo malo id factum est, vel conscius criminis existit, licet extraneus sit, pœna parricidii puniatur et neque gladio neque ignibus neque ulli alii sollemni pœnæ subjugetur, sed insutus culeo cum cane et gallo gallinaceo et vipera et simia et inter ejus ferales angustias comprehensus, secundum quod regionis qualitas tulerit, vel in vicinum mare vel in amnem projiciatur, ut omni elementorum usu vivus carere incipiat, et ei cælum superstiti, terra mortuo auferatur. Si quis autem alias cognatione vel adfinitate conjunctas personas necaverit, pœnam legis Corneliæ de sicariis sustinebit.

6. Another law, the *lex Pompeia de parricidiis*, inflicts on the most horrible of crimes a strange punishment. It provides, that any one who has hastened the death of a parent or child, or of any other relation whose murder is legally termed parricide, whether he acts openly or secretly, and whoever instigates or is an accomplice in the commission of the crime, although a stranger, shall undergo the penalty of parricide. He will be punished, not by the sword, nor by fire, nor by any ordinary mode of punishment, but he is to be sewed up in a sack with a dog, a cock, a viper, and an ape, and enclosed in this horrible prison he is to be, according to the nature of the place, thrown into the sea, or into a river, that even in his lifetime he may begin to be deprived of the use of the elements, and that the air may be denied to him while he lives, and the earth when he dies. He who kills persons allied to him by cognation or alliance, other than those we have mentioned, shall undergo the penalty of the *lex Cornelia de sicariis*.

D. xlviii. 9. 1, 9; C. ix. 17.

Lex Pompeia de parricidiis, passed in the consulship of Pompeius, B.C. 52. The punishment mentioned in the text is borrowed from the legislation of the Twelve Tables. The *lex Pompeia*, under the term *parricidium*, embraced the murder of any ascendant, of a brother or sister, of a husband or wife, of *consobrini*, of a step-father, step-mother, father-in-law, mother-in-law, &c., of a patron, and of a child if killed by the mother or grandfather, but not if killed by the father. (D. xlviii. 9. 1.) If there was no river at hand, the offender was torn to pieces by wild beasts. (D. xlviii. 9. 9. pr.)

7. Item lex Cornelia de falsis, quæ etiam testamentaria vocatur, pœnam irrogat ei, qui testamentum vel aliud instrumentum falsum scripserit, signaverit, recitaverit, subjecerit, quive signum adulterinum fecerit, sculpserit, expresserit sciens dolo malo. Ejusque legis pœna in

7. Also the *lex Cornelia de falsis*, otherwise called *testamentaria*, punishes any one who shall have written, sealed, read, or substituted a false testament, or any other instrument, or shall have made, cut, or impressed a false seal, knowingly and maliciously. The penalty is, upon a slave, the ex-

servos ultimum supplicium est, quod et in lege de sicariis et veneficis servatur, in liberos vero deportatio.

treme punishment of the law, as is pronounced by the *lex Cornelia* upon assassins and poisoners; that upon freemen is deportation.

D. xlviii. 10. 1. 4, 13; D. xlviii. 10. 16. 1.

Lex Cornelia de falsis, or *Cornelia testamentaria*, was passed under the dictatorship of Sylla, B.C. 81.

8. Item lex Julia de vi publica seu privata adversus eos exoritur, qui vim vel armatam vel sine armis commiserint. Sed si quidem armata vis arguatur, deportatio ei ex lege Julia de vi publica irrogatur: si vero sine armis, in tertiam partem bonorum publicatio imponitur. Sin autem per vim raptus virginis vel viduæ vel sanctimonialis, velatæ vel aliæ, fuerit perpetratus, tunc et peccatores et ei, qui opem flagitio dederunt, capite puniuntur secundum nostræ constitutionis definitionem, ex qua hæc apertius possibile est scire.

8. Also the *lex Julia de vi publica seu privata* punishes those who are guilty of violence, whether with armed force or without. For violence with armed force the penalty inflicted by the *lex Julia de vi publica* is deportation. For violence without arms, it is the confiscation of a third of the offender's property. But in case of the rape of a virgin, a widow, a person devoted to religion, whether wearing the veil or not, both the ravishers and all who have aided in the commission of the crime are punished capitally, according to the provisions of our constitution, in which may be found fuller information on this head.

D. xlviii. 6. 10. 2; C. ix. 13. 1.

Lex Julia de vi, passed in the time of Julius Cæsar or Augustus, but its exact date is not known.

9. Lex Julia peculatus eos punit, qui pecuniam vel rem publicam vel sacram vel religiosam furati fuerint. Sed si quidem ipsi judices tempore administrationis publicas pecunias subtraxerunt, capitali animadversione puniuntur, et non solum hi, sed etiam qui ministerium eis ad hoc adhibuerunt vel qui subtracta ab his scientes susceperunt: alii vero, qui in hanc legem inciderint, pœnæ deportationis subjugantur.

9. Also the *lex Julia peculatus* punishes those who have stolen public money or property, or anything sacred or religious. Magistrates, who, during the time of their administration, have stolen the public money, are punishable capitally, as also are all who aid them in their robbery, or who knowingly receive their plunder from them. Other persons who offend against this law are subject to the penalty of deportation.

D. xlviii. 13. 1, 3; C. ix. 28.

Lex Julia peculatus. The exact date of this law is also unknown. It probably belongs to the same epoch as the *lex Julia de vi*.

10. Est et inter publica judicia lex Fabia de plagiariis, quæ interdum capitis pœnam ex sacris constitutionibus irrogat, interdum leviorem.

10. There is also among the laws giving rise to public prosecutions the *lex Fabia de plagiariis*, which inflicts, in certain cases, capital punishment according to the constitutions, sometimes a lighter punishment.

C. ix. 20. 7.

Cicero refers to this law (*pro Rabirio*, 3), but nothing more is

known of it. A *plagiarius* was one who knowingly kept in irons, or confined, sold, gave, or bought a citizen (whether free-born or a freedman) or the slave of another.

11. Sunt præterea publica judicia lex Julia ambitus et lex Julia repetundarum et lex Julia de annona et lex Julia de residuis, quæ de certis capitulis loquuntur et animæ quidem amissionem non irrogant, aliis autem pœnis eos subjiciunt, qui præcepta earum neglexerint.

11. The following laws also pertain to public prosecutions: the *lex Julia ambitus*, the *lex Julia repetundarum*, the *lex Julia de annona*, and the *lex Julia de residuis*. These laws apply to certain special cases, and do not carry with them the punishment of death, but lesser punishments, against offenders.

D. xlviii. 11; D. xlviii. 13. 2. and 4. 3, 4, 5; D. xlviii. 12. 2; D. xlviii. 14.

Lex Julia ambitus, made in the time of Augustus, to repress illegal methods of seeking offices. (D. xlviii. 14.)

Lex Julia repetundarum, made in the time of Julius Cæsar, to punish magistrates or judges for receiving bribes. (D. xlviii. 11.)

Lex Julia de annona, made to repress combinations for heightening the price of provisions. (D. xlviii. 12.)

Lex Julia de residuis, made to punish those who gave an incomplete account of, or misappropriated, public moneys committed to their charge. (D. xlviii. 13. 2.)

It is uncertain whether these last two laws belong to the time of Julius Cæsar or of Augustus.

12. Sed de publicis judiciis hæc exposuimus, ut vobis possibile sit summo digito et quasi per indicem ea tetigisse. Alioquin diligentior eorum scientia vobis ex latioribus digestorum sive pandectarum libris Deo propitio adventura est.

12. This notice of public prosecutions has only been meant to give you the merest sketch that might serve you as a guide to studying them. You may, with the blessing of God, gain a more complete knowledge of them from the fuller account given in the Digest or Pandects.

SUMMARY.

BOOK I.

SOURCES OF LAW.

PRIVATE LAW: ITS SOURCES.—The Institutes treat of private law, *jus privatum*, the law that has to do with individuals, as distinguished from *jus publicum*, that which regards the Roman Empire and regulates religious worship and civil administration. (Tit. 1. 4, note.) The sources of private law are natural law, the law of nations, and the civil law. (A.) The two first are, in the system of Gaius, identical. That law which right reason commands, *jus naturale*, is also that law which is found to be common to the legal systems of different nations. Justinian sometimes adopts this method of speaking, and sometimes borrows passages in which the *jus naturale* has a larger sense, is thus distinguished from the *jus gentium*, and is extended to the rules which instinct makes animals obey. (Tit. 2. pr., note.) (B.) The civil law is the special law of the Romans, and is derived from the following sources:—

Sources of the Jus Civile.—1. Laws (*leges*) passed by the *comitia curiata* or *centuriata*. 2. *Plebiscita*, which by the *lex Hortensia* bound the whole people. (Tit. 2. 4.) 3. *Senatusconsulta*, which, especially after the beginning of the Empire, had the force of laws. (5.)* 4. The imperial constitutions, which, by virtue of the *lex regia* or law passed by the *comitia curiata* conferring the *imperium*, had the force of law, and which were of three kinds: (a) *epistolæ*, *mandata*, *rescripta*, announcements of the imperial will to different authorities; (b) *decreta*, judicial decisions of the Emperor; (c) *edicta*, enactments. (6.) 5. The edicts of the prætors (*jus honorarium*), who announced at the beginning of their year of office the rules they would follow in what was termed the *edictum perpetuum*, which ran on from year to year under successive prætors, with such additions and changes as each might think necessary, and which assumed a final shape in the time of Hadrian. The curule ædiles also issued edicts, which were part of the *jus honorarium*. (7.) 6. The *responsa prudentium*, who were first called on officially by Augustus to give their opinions, and

* When a number is placed between brackets, as here (5), it shows to which paragraph of the Title last mentioned reference is made.

whose decisions, when those who gave them agreed, were invested by Hadrian with the force of law. Special authority was given by Theodosius II. to the writings of the five great jurists, and, in case of their disagreement, to the writings of Papinian. (8.) 7. Custom, too, is one of the sources of private law, for customs are like laws, *legem imitantur*. Laws might be abrogated by desuetude (11), but particular customs could not prevail against general law. (9.)

LAW RELATING TO PERSONS.

Private law relates to persons, to things (including obligations), and actions. The law relating to persons is first treated under the three heads of *status*, that is, the legal capacity of persons, viz. *libertas*, *civitas*, and *familia;* and as *libertas* comes first, the first division of persons noticed is that into persons who are not free, i.e. slaves, and those who are freed, *libertini*, or free by birth, *ingenui*.

SLAVES.—Slavery, contrary to the law of nature, but recognised by the law of nations, is based on the fact that those who were originally treated as slaves had been preserved from death when defeated and captured in war. But all slaves are not captured in war: how then do these others become slaves? 1. By birth, for the children of a female slave always follow her condition; and, 2, slavery is inflicted as a punishment on persons born free, as upon a free person who, to share the price, colludes with a fictitious vendor who sells him as a slave, and on others guilty of great crimes, *servi pœnæ*. (Tit. 3.) Opposed to slaves are those who are born free, born in matrimony, or, if not, of a woman who at any time after conception was free. (Tit. 4.) Lastly, there is an intermediate class, those born slaves, but made free (*libertini*), and their position depended on the mode and circumstances of the manumission.

MANUMISSION.—If manumission was made in any one of the three modes known to the old law, *censu*, *vindicta*, or *testamento*, it was said to be *legitima;* the slave became by manumission a Roman citizen until the time of Augustus, when, by the *lex Ælia Sentia*, another condition was imposed, and it was necessary that, unless the manumission was made *vindicta*, the emancipated slave should be thirty years old and the manumittor twenty (Tit. 6. 4); unless some good cause (5) for dispensing with this rule was shown to the council. The requirement of age in the testator, in the case of manumission by testament, was first reduced by Justinian from twenty years to seventeen, and subsequently done away with. (Tit. 6. 7, note.) It was also necessary that the master should have complete ownership of the slave. (Tit. 5. 3, note.) But if the manumission failed in any of these respects, or if it was made in a private manner, as by letter, or in presence of friends, the emancipated slave was in the position of a *Latinus*, not in that of a Roman citizen, it being, however, open to him to rise to the position of a citizen by certain modes, and chiefly

by rendering public services. (Tit. 5. 3, note.) If, previously to emancipation, slaves had been guilty of some great crime, then they were only raised by emancipation to the rank of *dediticii* or surrendered enemies. Justinian abolished these distinctions and made every emancipated slave a Roman citizen. (Tit. 5. 3.) Further, the *lex Ælia Sentia* nullified manumissions made in prejudice of creditors, except that a slave, for the purpose of administering the inheritance, might be made the sole and necessary heir of the testator (Tit. 6. pr., 1); and the *lex Furia Caninia*, abolished by Justinian, limited the number of slaves a testator might manumit. (Tit. 7.) The power of a master over his slave, formerly unlimited, was gradually subjected to many restrictions. The Emperor Antoninus Pius extended the provisions of Sylla's law, the *lex Cornelia de sicariis*, which punished with death or exile the homicide of the slave of another, to the case of a master killing his own slave; and also protected slaves cruelly treated and fleeing to the statue of the emperor. (Tit. 8. 2.) Gradually, not only the life, but the person, and even the property, in fact though not in law, of the slave were protected. (Tit. 8. 2, note.)

CIVITAS is indirectly treated in the preceding notice of *Latini*, and in the twelfth and sixteenth Titles, in which the loss of citizenship is noticed. But the subject mainly belongs to the sphere of public law, and the rest of the First Book is occupied with considering the third head of *status*, FAMILIA.—Here the main division is into persons not *sui juris* and persons *sui juris*. The position of persons not *sui juris* is a consequence of the *patria potestas*. The subject of the *patria potestas*, the power of the father over his descendants, originally not much less than that of a master over his slaves, is discussed in the ninth and three following Titles. Justinian inquires, 1, How it arises; 2, How it is ended.

PATRIA POTESTAS: HOW IT ARISES.—It arises in three ways, by, 1, Marriage; 2, Legitimation; 3, Adoption.

I. MARRIAGE.—In order that marriage may give rise to the *patria potestas*, it must be according to law (*justæ nuptiæ*), and for this there were three requisites: 1, Puberty (fourteen years for husband, twelve for wife); 2, Consent of the parties, the intention to be married manifested by the woman passing into the possession of the man; and 3, Connubium; the parties must be legally capable of being married to each other.

There were three ways in which the parties might fail to have this legal capacity. 1. They, or one of them, might be persons or a person whom the State held to be incapable of forming the *nexus* termed *justæ nuptiæ;* as, for instance, a citizen and a foreigner could not form the tie of *justæ nuptiæ*, &c. (Tit. 10. pr. and 11, note.) 2. They might be within the prohibited degrees of relationship (Tit. 10. 1-10); and it is to be remarked that relationship by adoption, as well as by blood, constitutes a bar. (Tit. 10. 2.) 3. They might, or one of them might, be *in potestate*, and then, unless the consent of the person in

whose *potestas* they were was obtained, the marriage was invalid. (Tit. 10. pr.) Divorce was always permitted by mutual consent, but repudiation by one party only under penalties, except in case of misconduct, and with certain solemn forms.

II. Legitimation, by which the offspring of concubinage were placed in the position of *liberi legitimi*, and this could be effected in three ways. 1. Oblation to the *curia*, i.e. enrolling the child in the number of those on whom the chief burdens of provincial towns fell. 2. The subsequent marriage of the parents; an act attesting the marriage and the ratification by the children being necessary. 3. The rescript of the emperor, granted in case one of the parents was dead. (Tit. 10. 13.)

III. Adoption.—A general term, under which is included *adoptio* properly so called, when a person *in potestate* was given in adoption, and *arrogatio* when the person adopted was *sui juris*. (Tit. 11.) Adoption in the old law was effected by three sales to destroy the *patria potestas* of the person given in adoption, and a fictitious process, *in jure cessio,* by which the person adopted was given over to the adopter; for which process Justinian substituted the execution of a deed before a magistrate. *Arrogatio* had a more public character, and was made originally before the *curia*, then before lictors representing the *curia*, and subsequently by imperial rescript. (1.) Originally a person adopted or arrogated was in the *potestas* of the person adopting or arrogating, exactly as if he had been so by birth, and was not in any way protected against him; but Justinian entirely altered the law as to *adoptio*, and under his legislation (unless the adopter was an ascendant paternal or maternal of the adopted, in which case the rules of the old law operated), the person adopted did not pass at all into the family of the adopter, but remained in his natural family; and the only effect of adoption was to give the adopted a right of succession to the adopter if intestate. Provisions were also made to protect the arrogated if he was not of the age of puberty. Such an arrogation was not permitted unless after inquiry it had been found to be beneficial to the arrogated, and if he was emancipated under the age of puberty, although for a good reason, he got all his own property back, while, if he was disinherited or emancipated without good reason before that age, he not only got his own property back, but got a fourth of the arrogator's property (*quarta Antonina*); and lastly, when he attained puberty, he could have the arrogation rescinded if prejudicial to him. (3, note.) Women, who had lost their own children, were permitted by the emperors to adopt. (10.) The chief rule as to the capacity of adopting is that adoption is said to imitate nature, and therefore the adopter must be eighteen years at least older than the adopted, so as to permit physically of his having been the natural father. (4.)

Patria Potestas: how ended.—The *patria potestas* might be dissolved in four ways. 1. *Death of the parent;* the grandson, however, whose father was living, passing into the power of the father on the grandfather's death. (Tit. 12. pr.) 2. *Deminutio capitis;*

the father or son losing that civic position which was necessary for the exercise of *patria potestas;* and this might happen by (a) *deportatio in insulam* (1); (b) *condemnatio* to be a *servus pœnæ* (3); and (c) *captivitas.* But if the *capite minutus* was restored by the emperor to his former rights (1), or if the prisoner became free, then (by what in the second of these cases was termed *jus postliminii*) the father was placed in exactly the same position as if the *deportatio* or *captivitas* had not taken place. (5.) 3. *Attainment of dignities,* by the son attaining the patriciate (4) or, subsequently to the date of the Institutes, other dignities. (4, note.) 4. *Emancipation,* which, under the old law, was effected by three fictitious sales made by the father, and then the purchaser reselling the son to the father, who then manumitted him; the object of this being that the father, being the manumittor, might have the rights of patronage, the chief of which was the same right of succession to the son as the manumittor of a slave had, in case of his enfranchisement. (Tit. 12. 6, note, and Tit. 5. 3, note.) Under the legislation of Justinian, emancipation was effected by a declaration before a judge or magistrate. (Tit. 12. 6.)

Other Forms of Potestas.—In order to make the subject of Potestas complete, we ought to notice not only, 1, the power of the master over the slave, and 2, the power of the father over his descendants, but 3, the power of the husband over the wife who passed *in manum,* as she did when married, by (a) *confarreatio;* (b) *coemptio,* or fictitious sale; and (c) *usus,* the parties living together for a year without the wife breaking the use by three nights' absence (Tit. 10. pr., note); and 4, the power, in the old law, of the purchaser over a person *in mancipio,* that is, sold to him by the father of the person sold, the person *in mancipio* being, as regards the purchaser, almost in the position of a slave, although, as regards others, he was still *ingenuus.* (Tit. 8, pr., note.)

Persons sui Juris: their Incapacities. Tutors and Curators.—From the beginning of the 8th Title we have been considering persons *in potestate.* We now turn to persons *sui juris;* but it is only of certain incapacities of persons *sui juris* that the Institutes treat: incapacities arising from, 1, age; 2, physical or mental infirmity; or (so far as reference is made to an earlier period of law), 3, sex. Tutors were appointed to protect the interests and authorise the acts of pupils under the age of puberty; and curators might be appointed to watch over, 1, prodigals; 2, persons afflicted with mental or great physical infirmity; 3, persons above the age of puberty, but under the age of twenty-five years. The rest of this book is taken up with the subject of tutors and curators.

Tutors: how appointed.—Tutors are first divided, according to the mode of their appointment, into, 1, Testamentary, 2, Legitimate, 3, Fiduciary, and 4, Given by the magistrate.

I. *Testamentary Tutors: who may appoint.*—The *paterfamilias* may appoint testamentary tutors to all descendants under his power

who become *sui juris* on his death. (Tit. 13. 3.) This excludes grandchildren having a father living, who, by the death of the *paterfamilias*, come under the power of their own father (3), and includes posthumous children of the *paterfamilias*, who become *sui juris* at his death. (4.) The wishes of the father were also carried out by the magistrate (usually as a matter of course), if he appointed a tutor by his testament to an emancipated child; and the magistrate generally ratified, after he had inquired into the circumstances, the appointment of a testamentary tutor by a father in case of his natural children, or such an appointment by others who had a strong interest in, or had left property to, any child under the age of puberty. (5, note.)

Testamentary Tutors: who may be appointed.—A *filiusfamilias* could be appointed to the office, as it was of a public character. (Tit. 14. pr.) Women could not, although the emperor would sometimes interfere to confirm their appointment. (Tit. 14. pr., note.) Slaves could not; and, if a slave of the testator was appointed tutor, the appointment was held to carry the freedom of the slave with it, and if the testator appointed the slave of another, this imposed on the testamentary heir the duty of purchasing, if possible, the freedom of the slave. If a madman, or a person under the age of twenty-five years, was appointed a testamentary tutor, he could only act if he became sane, or after he was twenty-five, and, meantime, the magistrate appointed another tutor. (2.) A tutor could be appointed to hold his office after or up to a certain time (3), but he could not be appointed to discharge one portion only of the functions of a tutor, as he was given to the person, not to the property. (4.)

II. *Legitimate Tutors* (i.e. called to their office by the statute law).—1. In case no testamentary tutor had been appointed, the *agnati* had a claim, under the law of the Twelve Tables, to be tutors, and hence were called *legitimi tutores* (Tit. 15. pr.), and this includes the case of the testamentary tutor dying in the lifetime of the testator. (2.) Under the later emperors the mother, and even the grandmother, might be appointed tutors, where none was appointed by testament. (3, note.) The right to be tutor did not belong to all the *agnati*, but only to those nearest in degree, all those in the same degree sharing the office. (Tit. 16. 7.)

Capitis Deminutio.—The tie of agnation being severed by *capitis deminutio*, the Institutes digress to explain, in the 16th Title, what *capitis deminutio* means. It means a change in the *caput*, or legal existence, of a person, so that his *status* undergoes change in one or more, or all, of its elements, viz. liberty, citizenship, and family. (Tit. 16. pr.) The *deminutio* is termed *maxima* when all three elements are lost, when the *capite minutus* ceases to be free and to be a citizen, and loses his family position, as would happen in the case of *servi pœnæ*, freedmen condemned to be again slaves for ingratitude, and freemen joining in a fraudulent sale of themselves. (1.) The *capitis deminutio* was called *media* when liberty was not touched, but citizenship was lost, and with

it family position, as would happen in the case of any one interdicted fire and water, or deported to an island. (2.) The *capitis deminutio* was said to be *minima* when liberty and citizenship were not touched, but the family position was altered, as in the case of adoption, arrogation, emancipation, or, in the old law, a wife's passing *in manum.* (3.) The rights of agnation are affected by all the three kinds, but those of cognation only by the *maxima* and *media.* (6.) The *minima capitis deminutio*, or change of family, so far changed the legal existence of the person undergoing it that, under the old law, he not only lost his place in the intestate succession of the family he quitted, but he could not be sued for his antecedent debts, and any usufructs he held came to an end. (3, note.) Mere loss of dignity, and even infamy, produced no change of *status.* (5.)

2. To return to the subject of legitimate tutors. Patrons are the legitimate tutors of their freedmen and freedwomen. In case the manumittors are dead, their children are the legitimate tutors of the freedmen and freedwomen. (Tit. 17.)

3. Parents are the legitimate tutors of their children or other descendants whom they have emancipated below the age of puberty. (Tit. 18.)

III. *Fiduciary Tutors.*—In case the master emancipated his slave, and died before the freedmen attained the age of puberty, the tutelage of this slave passed by law, or rather by an extension of the law of the Twelve Tables (Tit. 17), to the children of the emancipator. But if an ascendant emancipated his descendant, and died before the person emancipated attained the age of puberty, the tutelage also passed to the children of the emancipator, but it was not supposed to do so by any express law, and the tutors in this case were called, not *legitimi*, but *fiduciarii*, a term properly applied to the nominal tutor, who, in case of emancipation, did not resell to the father, but himself emancipated the son, and had thus, as emancipator, the tutelage, which he held in trust (whence he was called *fiduciarius*) for the father. (Tit. 19.)

IV. *Tutors appointed by the magistrate.*—Tutors were appointed by the magistrate under the *lex Atilia* and the *lex Julia et Titia.* Under the first of these laws a tutor was appointed at Rome by the prætor and a majority of the tribunes; and under the second, in the provinces, by the *præses* (Tit. 20. pr.), if there was no tutor on whom the office devolved under the heads of appointment already noticed, or if from any cause there was a vacancy in the office. (1, 2.) Subsequently, under the empire, the tutor was in such cases appointed at Rome by the *præfectus urbis*, if the position of the pupil was a high one, and by the *prætor urbanus* if it was not. The *præses* appointed in the provinces, and, in cases of small importance, the local magistrates; but these magistrates needed the preliminary authority of the *præses.* In all cases, inquiry was made into the circumstances before the appointment was made. (Tit. 20. 4.) Justinian, in cases where the fortune of the pupil or adult (for here we have a provision extending to curators)

did not exceed 500 *solidi*, allowed the local magistrate to appoint without any authorisation, merely taking security from the person appointed, without inquiring into the circumstances of the case. (5.)

Tutelage of Women.—Under the old law women were in tutelage all their lives, even after they had become *sui juris*, the tutor being appointed by the testament of the husband, if she was *in manu*, and the husband could not only appoint a tutor, but give the wife the option of choosing one. If no testamentary tutor was appointed, the nearest *agnatus* was the tutor; and the tutor might be changed, either by his act, or on the woman's application. After she had attained the age of puberty, the woman under tutelage managed her own affairs, but the tutor had to intervene in order to sanction solemn acts. All this tutelage of women above the age of puberty had become obsolete before the time of Justinian. (6, note.)

Authority of the Tutor.—The tutor had, in the first place, to manage the affairs of the pupil; and, in the second place, to add his *auctoritas*, i.e. the supplement of what was wanted to make the pupil legally competent to act. If the pupil was under seven years old, the tutor could only in very rare cases, where the benefit was clearly great for the pupil, go through any acts on behalf of the infant beyond such as were necessary for the ordinary management of his affairs. It was only, for example, at a late period of the empire, that the tutor was allowed to enter on an inheritance on behalf of the *infans*. Between the ages of seven and fourteen, the pupil could contract without the authorisation of the tutor, so far as the contract was beneficial to him; but every unauthorised contract was inoperative to his prejudice. (Tit. 21. pr., note.) The pupil could not take any very serious step involving possible risk, such as entering on an inheritance, demanding possession of goods, or taking an inheritance under a *fideicommissum*, without the authorisation of the tutor. (1.) The tutor was obliged to give this authorisation personally, not by writing, and could not give it by ratification. (2.) If there was a suit between the tutor and pupil, a curator was appointed to intervene in this suit on behalf of the pupil. (3.)

Termination of Tutor's Office.—The office of a tutor came to an end—

(*a*) By the pupil reaching the age of puberty, which had previously been regarded as a time varying according to the facts of each case, eighteen years being the maximum, but which Justinian fixed at fourteen for males, and twelve for females. (Tit. 22. pr.)

(*b*) By the pupil being arrogated, deported, reduced to slavery, or made a captive, or dying. (1.)

(*c*) By the condition being fulfilled on which the testamentary tutor was to cease to be tutor, or the time having expired during which the testamentary tutor was to act. (3, 5.)

(*d*) By the tutor dying (3); or—

(*e*) Undergoing, however appointed, the *maxima* or *media capitis deminutio* (4); and

(*f*) In the case of a *tutor legitimus*, his undergoing the *minima capitis deminutio.* (4.) And

(*g*) By the tutor being removed as suspected, or being relieved from his office on good grounds of excuse. (6.)

CURATORS: WHOM THEY WERE TO PROTECT.—Curators were appointed to protect the property and interests of four classes of persons:—

1. *Madmen* (*furiosi*).—This was by the law of the Twelve Tables, and was extended by the prætors so as to include all forms of mental alienation (Tit. 23. 3, note), and the deaf, mute, and permanently infirm. (4.)

2. *Prodigals* (i.e. persons wasting recklessly their property).—This was also by the law of the Twelve Tables, but that law only applied to the case of a prodigal wasting goods received under an intestate succession, while the prætor extended it to all cases of prodigality. The fact of the madness or prodigality was first ascertained by the prætor, and then the *prodigus* was absolutely interdicted from managing his own affairs, but the *furiosus* was not so interdicted, and was only placed under the care of the curator. When the case came within the law of the Twelve Tables, the curatorship of the *furiosus* and *prodigus* belonged to the nearest agnate. The magistrate appointed in cases of the prætorian extensions of the terms, and in the time of Justinian in all cases. (Tit. 23. 3.)

3. *Adolescentes.*—Persons of either sex, above the age of puberty, and under the age of twenty-five years.

The *lex Plœtoria* subjected to prosecution and infamy persons overreaching adolescents under twenty-five years, and possibly allowed curators to be appointed to protect them. Subsequently prætors protected such persons by ordering, in case they had been prejudiced, a *restitutio in integrum*, that is, that they should be put in the same position which they would have occupied if not prejudiced. Lastly, Marcus Antoninus ordered that curators should be appointed in all cases on the application of the *minor.* (Tit. 23. pr., note.) The adolescent was not obliged to have a curator for general purposes unless he wished, but a curator could be forced on him in case of a lawsuit, or his debtor wishing to pay him, or his late tutor wishing to settle accounts with him; and if he had a curator he could not alienate any part of his property without the sanction of the curator. (Tit. 23. 2, note.) The curator to an adolescent could only be appointed by the magistrate, the same magistrates appointing who appointed tutors; but a magistrate would generally have regard to the wishes, as to curatorship, expressed in the testament of a person who could have appointed a tutor. (1.)

4. *Pupils.*—Pupils sometimes received curators, as, for example, if the *tutor legitimus* was unfit, a curator was appointed to protect the pupil and act, to a great extent, instead of the tutor; or, if the testamentary tutor, or the tutor appointed by the magistrate, was unfit, a curator

was appointed to act conjointly with him, and curators were assigned in place of tutors excused for a time only. (5.)

If a tutor was prevented by illness or other causes from administering the affairs of his pupil, a person might be appointed to act for him, but this person was not a curator, but a delegate of the tutor. (6.)

Modes of Protection against Tutors and Curators.—Persons having tutors and curators were protected against the misconduct of these in the following ways:—

1. Security was required and enforced by the exaction of pledges from *tutores* and *curatores legitimi*, and from those appointed by inferior magistrates. (Tit. 24. pr.) 2. If such security was not taken, or was taken to an insufficient degree, the magistrate was himself liable in an action, which extended to his heirs. (2.) 3. Every tutor or curator was bound to make an inventory of the property of the pupil or person under care. (Tit. 24. pr., note.) 4. Every tutor or curator was, after the publication of the 78th Novel, obliged to pledge himself by oath that he would act as a *bonus paterfamilias*. (Tit. 24. pr., note.) 5. The property of tutors and curators was subjected to a tacit hypothec to make good losses sustained through their neglect. (Tit. 24. pr., note.) 6. An action might be brought against tutors or curators when their office was ended, to make them account. (Tit. 22. 6, note.) 7. Tutors and curators might be removed by the *actio suspecti*. (Tit. 26.)

Removal on Suspicion.—All tutors, including the patron (though in his case the grounds of a decision against him were not to be disclosed, in order to save his reputation—Tit. 26. 2), and all curators, might be removed, after or even before entering on office, on a charge of suspicion, *suspecti crimen*—a charge permitted by the Twelve Tables (Tit. 26. pr.)—being successfully brought before the prætor at Rome, the *præses*, or proconsular legate, in the provinces, by any one, even a woman (3), except that the pupil could not bring this charge against his tutor, while the minor could bring it against his curator. (4.) Infamy attached, if fraud, but not if neglect, was proved. (6.) The tutor or curator might be removed although solvent (5), and although he offered to give security. (12.) While the action was pending, the accused was suspended from his administration (7), but if he died the action was at an end. (8.) It was the duty of the tutor to see that the amount of the pupil's maintenance was fixed by a magistrate. If he failed to do so, this was a ground for his being removed on a charge of suspicion. (9.) If he falsely asserted that the pupil's means did not suffice to allow maintenance, he was to be handed over to the *præfectus urbis*, or *præses*, to be punished, as also was a tutor who had obtained his office by bribery, and a freedman proved to be guilty of fraud while acting as tutor to the son or grandson of the patron. (10, 11.)

Where there were more than one tutor or curator, one might offer

to his co-tutor or co-curator to give security, and alone act as administrator, the other co-tutor or co-curator having, however, the preference if he, when thus challenged, was willing to give security. If no tutor or curator came forward in this way, the person, if any, appointed by the testament to administer was allowed to act; and, if there was no such person, the majority of the tutors or curators was to decide who should act, and, if an agreement could not be come to in this way, the magistrate would decide. (Tit. 24. 1.)

TUTORS AND CURATORS: WHEN EXCUSED.—Tutors and curators might be excused from holding their offices on grounds which may be classed under four heads:—

1. *Having rendered a service to the public, or being engaged in the discharge of some public duty.*—(a) Having a certain number of children living (three at Rome, four in Italy, five in the provinces), children slain in battle, and grandchildren, in lieu of their parent, being reckoned in the number (Tit. 25. pr.); (b) being engaged in the administration of the *fiscus* (1); (c) being absent on the service of the State (2); (d) being magistrates (3), military persons (14), or members of learned professions (15).

2. *Being in a position adverse to the pupil or adult.*—(a) Being engaged in a lawsuit with the pupil or adult, if the suit embraced the whole of the latter's property, or was for an inheritance (4); (b) being a creditor or debtor (4, note); (c) being appointed by a father through enmity (9); (d) having been in deadly enmity with the father (11); (e) having had their *status* questioned by the father (12); (f) being the husband of the woman under care (19).

3. *Being incompetent to sustain the burden of the office.*—(a) Through being in extreme poverty (6); (b) being in bad health (7); (c) not being able to read (8); (d) being over seventy years of age (13).

4. *Filling, or having filled, similar offices.*—(a) Holding already three offices of the kind in question (5); (b) having already been the tutor of the person to whom a curator was to be appointed (18).

BOOK II.

LAW RELATING TO THINGS.

Distinctions of Things.—We now come to the law relating to things, but the Institutes only deal with private law. The first step is, therefore, to notice the distinction of things according as they are *extra nostrum patrimonium* or *in nostro patrimonio*, that is, according as they are or are not capable of being the property of private persons. It is only of things *in nostro patrimonio* that the Institutes treat. Of things within the compass of private law the principal division is that into things corporeal and incorporeal; into things like a field, *quæ tangi possunt*, and things like a right of way over a field, an inheritance, or an obligation, *quæ tangi non possunt*. (Tit. 2.)

Modes of Acquisition.—How do we acquire things *in nostro patrimonio*, whether corporeal or incorporeal? The answer to this question takes up the Second Book of the Institutes, and the Third Book down to the end of the Twelfth Title. First the inquiry is made how we acquire particular things, *res singulæ*, and then how we acquire groups of things, *universitates rerum*, like an inheritance.

We acquire particular things by, 1, *Occupatio;* 2, *Accessio;* 3, *Traditio;* 4, *Usucapio;* 5, *Donatio;* the first three being modes of acquiring *jure naturali;* the last two, *jure civili*. We acquire groups of things by, 1, Testamentary succession; 2, Intestate succession; 3, Arrogation; 4, *Bonorum addictio;* 5, *Bonorum venditio;* 6, Forfeiture under the *senatusconsultum Claudianum*.

The First Title of the Second Book treats of the distinction of things according as they are *extra nostrum patrimonium* or *in nostro patrimonio*, and then of the acquisition of particular things by *occupatio*, *accessio*, and *traditio*.

Res extra nostrum Patrimonium are, 1, *Communes*, common to all men, such as the air, the sea, and the sea-shore as far as the limit of the highest winter flood (Tit. 1. 1, 3); every one being allowed to use the sea-shore, as for drying nets (5); avoiding, however, injury to existing buildings thereon (1); and each State having the sea-shore adjacent to its territory under its supervision. (2, note.) 2. *Publicæ*, belonging to the State, as rivers and ports, and the right of fishing therein, and the use for purposes of navigation of the banks thereof, although these banks might belong to private proprietors. (2, 4.) 3. *Universitatis*, belonging to a corporate body, as, e.g., a racecourse belonging to a city. (6.) 4. *Nullius*, in the sense of being so devoted

to the gods that they cannot belong to men; and such *res nullius* may be (a) *sacræ*, consecrated, as temples, by the pontiffs, with the sanction of the State (8); (b) *religiosæ*, invested with a religious character by interment, private proprietors being at liberty to impress this character on their ground by simply burying a dead body there (9); and (c) *sanctæ*, hallowed, or protected against violation, like the gates or walls of a city (10).

MODES OF ACQUIRING PARTICULAR THINGS JURE NATURALI.—Particular things *in nostro patrimonio* are acquired by—

I. OCCUPATIO, i.e. the taking or holding, as the holder's own, of *res nullius*, in the sense of things which previously belonged to no one, such as:—(a) Wild animals wherever found, which you have actually captured, not merely wounded (Tit. 1. 13), and not let go again. (12.) Bees you have hived. (14.) (But swarms issuing from your hive and staying in your sight and power (14); wild animals, such as pigeons and deer, that have acquired the habit of returning to your keeping, and fowls, not wild, but that stray from your keeping (16), are considered as your property and not *res nullius*, and to take them is theft.) (16.) (b) Things taken from the enemy; if the things taken from the enemy by a Roman army have been previously taken by him from a citizen, they will, as a general rule, form part of the *præda* or booty of the Roman army; but special things, such as land and slaves, are, by a kind of postliminy applied to them, allowed to revert to the owner. (17, note.) (c) Anything found on the sea-shore. (18.) (d) Islands formed in the sea. (22.) (e) Things found which have been intentionally abandoned by their owner (17), as distinguished from things which the owner has not wished to cease to own, as things thrown overboard in a storm or dropped out of a carriage. (48.)

II. ACCESSIO.—There is no notice in the Institutes of *accessio* as a distinct mode of acquisition. The subject is treated as growing out of *occupatio.*

Acquisition by accession may be regarded as arising in two classes of cases. 1. In cases of natural increment. 2. In cases where, the things of two owners being mixed, the law decides which owner shall have the thing resulting from the mixture.

1. *Accession by natural increment.*—1. An owner gains something new by natural increment in the following instances:—(a) The young of his animals. (19.) (b) New soil added imperceptibly to his soil by alluvion. (20.) (c) A portion of his neighbour's soil borne by a river to his soil and remaining there till the roots of trees thereon become attached to his soil. (21.) (d) An island being formed in a river; the owner of the bank has the ownership in this island up to the line of the mid channel. (22.) (e) The bed of a river left dry, up to the same line. (23.)

Accessions by natural increment might occur when a possessor or a usufructuary, and not the owner, held the land. To whom did the fruits belong? It is only of gathered fruits we can speak, for if the

owner dispossessed the possessor, the owner immediately took all the fruits ungathered, and if the usufructuary died the same thing happened. With regard to the possessor, the *bonâ fide* possessor was not responsible for the fruits he had consumed, while the *mala fide* possessor was responsible. (35, note.) The usufructuary had a right to take all the fruits, including the young of animals; but the children of female slaves belonged to the owner, not to the usufructuary. (36, 37.)

2. *Accession in favour of one of two owners.*—The following instances are given in the Institutes of cases where, the things of two owners being mixed, the law decides which owner shall have the thing resulting from the mixture.

1. A makes a thing with the materials of B. Here, if the thing can be reduced to its rude materials, like a vessel of silver, the thing made belongs to B; if not, it belongs to A, as the maker of a *nova species.* (25.)

A makes a thing partly with his own materials and partly with the materials of B. The thing made belongs to A. (25.)

2. A weaves in his garment the purple of B. If the purple is still separable, the purple belongs to B; if not, to A, the garment being considered the principal, the purple the accessory thing. (26.)

3. Two owners consent to mix their materials. The product belongs to them in common. (27.)

4. The materials of two owners are mixed by accident.

If the mixed particles are physically inseparable, as when two metals are fused together, the product belongs to them in common. (27.)

If the mixed particles are physically separable, as when two qualities of wheat are mixed, each remains the owner of his share of the mixed wheat. (28.)

5. The owner of the soil builds with the materials of another.

The owner of the materials remains the owner, but he cannot have the house pulled down. He may wait, if he pleases, till the building is destroyed, and then reclaim his materials, or he may bring an action *de tigno juncto* and get double the value of the materials, and then his claim for the materials is at an end if the owner of the soil did not know that the materials were not his; but if he did this, the owner of the materials may bring the action *de tigno juncto*, and also make the wrongdoer pay a further penalty by bringing an action *ad exhibendum*, and may, if the building is pulled down, reclaim the materials. (29.)

6. The owner of materials builds on the soil of another.

(*a*) Let us suppose the owner of the materials is still in possession of the soil. The owner of the soil seeks to recover it. He is obliged to compensate the owner of the materials for the additional value given by the building to the soil, if the builder did not know that he was building on another's soil. If he did know this, the owner is obliged to let him take away such of the materials as can be removed without damage. (30, note.)

(*b*) Let us suppose the owner of the materials is not still in possession of the soil. Then, whether he knew or did not know that he was building on another's soil, he may, if the building is destroyed, reclaim the materials, but can get no compensation for the additional value he has given to the soil. (30, note.)

7. A tree belonging to A is planted in the soil of B.

Until it takes root in the new soil, the tree continues the property of A; but a rooted tree is always the property of the owner of the soil. (31.)

8. The wheat of A is sown in the land of B.

Sown wheat is on the footing of rooted trees. The wheat belongs to B; but the sower, if in *bona fide* possession, is protected against B turning him out without compensation for the value of the wheat sown. (32.)

9. A writes a poem or history on the parchment or paper of B.

B, the owner of the parchment, still remains owner, after the parchment has been written on. But if A is in *bona fide* possession of the parchment, B cannot get it from him without offering to pay him the cost of writing. (33.)

10. A paints a picture on the tablet of B.

Here, in consequence of the possible value of pictures, the decision is the other way. The painted tablet belongs to A. If B, the owner of the tablet, is in possession of it after it has been painted on, A cannot get it from him without offering to pay the cost of the tablet. If, however, A is in possession of the tablet, B may claim the tablet by an action in which he is supposed still to be the owner, offering to pay the cost of the painting; but the painter could stop the action by paying the cost of the tablet. (34.)

11. A, without express search, finds treasure in the land of B. Half goes to A, half to B. (39.)

III. Traditio: or delivery.—Its constituent elements are three. 1. The owner of a thing means by the transfer to pass the property he transfers. 2. He, or any one entitled to act for him (42, 43), transfers by actually passing the thing, or by giving the transferee command over it, as when he gives the keys of a granary. (45.) 3. The transferee, meaning thereby to become owner, receives it. *Traditio* was necessary to pass property of all kinds; and in Justinian's time, land, wherever situated, passed by tradition. (40, note.)

The handing over and the meaning to pass the property are both necessary. The seller may hand over a thing, but he generally does not mean to pass the property till he is actually paid; and then not till the seller is paid, does the thing handed over become the property of the buyer. (41.) The lender, again, hands over a thing, not meaning to cease to be owner of it. If he changes his mind and wishes to give it, his purpose of giving unites with the previous act of handing over, and the legal *traditio* is accomplished. (41.) Things on board ship may be thrown overboard to lighten the ship, but their owners do not

mean to cease to be owners, and therefore the property in them does not pass to those who may pick them up. (48.) It is not, however, necessary that the transferee should be a person definitely ascertained, for if money is thrown to a mob, the *incertæ personæ* who pick it up become the owners by *traditio*. (46.)

Servitudes.—The Institutes, at the end of this explanation of the modes of acquiring particular things *jure naturali*, pause, before speaking of the modes of acquiring such things *jure civili*, to treat of servitudes, which are introduced by noticing at the beginning of the Second Title the division of things into *corporeal* and *incorporeal*, and saying that among *incorporeal* things are servitudes, or portions of the right of ownership enjoyed by persons other than the owners of the thing itself. Servitudes are (*a*) *prædial* when enjoyed over one thing in virtue of the ownership of another thing; (prædial servitudes being of two kinds: rural and urban), and (*b*) *personal* when attached to the person of the owner of the servitude.

Prædial Servitudes.—Rural prædial servitudes (affecting the soil) were so called because they were of kinds most frequently met with in the country; while urban prædial servitudes (affecting something built on the soil) were so called because they were of kinds most frequently met with in the city. The four kinds of rural prædial servitudes noticed in the Institutes, with an intimation that there are others (Tit. 3. 2), are, 1, *iter*, the right of passing; 2, *actus*, the right of driving cattle; 3, *via*, the right of driving a vehicle over another man's land; the more extensive always involving the less extensive right; and, 4, *aquæductus*, the right of conducting water through another man's land. (Tit. 3. pr.) Of urban servitudes the instances given in the Institutes are the right, 1, to make a neighbour's house sustain the weight of that of the owner of the servitude; 2, to insert a beam in another man's house; 3, to make another man receive the overflow of water from the roof or gutters (or to allow him not to be subject any more to the servitude of receiving such an overflow, if this, which does not seem a servitude, is the meaning of *stillicidium non recipiendi*); 4, to prevent another man raising his house higher than that of the owner of the servitude; 5, to prevent another man blocking up the lights of the owner of the servitude. (1.)

Personal Servitudes are the following: 1, *Ususfructus;* 2, *Usus;* 3, *Habitatio.*

Ususfructus is the right of using and taking the fruits of anything, the fruits including the *fructus civiles*, i.e. the profits derived from selling or letting the right of taking the fruits. The usufructuary or owner of this servitude had to act as a good *paterfamilias*, taking, and giving security that he would take, good care of the thing, and making losses good. If the substance of the thing ceased to exist, his servitude was at an end, and it was personal to himself and did not pass to his heirs, and only the fruits actually gathered by him belonged to him. (Tit. 4. pr.) In the old law only things not consumed in the

use could be the subjects of usufruct; but things consumed in the use, such as garments or wine, might, under a *senatusconsultum* of the time of Augustus, be made subject to a usufruct in favour of a legatee, the usufructuary having to give security that at the termination of the usufruct he would pay their value as estimated at the commencement of the usufruct. (2.)

Usus, or the naked use, is the right of using the thing, not of taking the fruits of it except for his daily wants. (Tit. 5. 1.) In the case of a house, it is the use for the purpose of living in it with his family only, and at the most receiving a guest in it. (2.) *Habitatio* is the use of a house for the purpose of living therein, with something more added in the right of letting it. (5.)

Creation of Servitudes.—Servitudes were created in the following ways:—1. *Mancipatio.*—This only applied to prædial rural servitudes. 2. *In jure cessio.*—(Both these were obsolete in the time of Justinian.) 3. Pacts and stipulations, followed by *quasi*-tradition, i.e. affording the means of actual exercise of the rights. 4. Testament. 5. *Adjudicatio.* 6. *Deductio.*—A thing is transferred, *minus* the servitude, which is reserved by the transferrer. 7. Usucapion.—The acquisition of servitudes by usucapion was forbidden by the *lex Scribonia;* but long possession of them, or at least of some of them, was protected by the prætor after a time, the length of which is uncertain, but which was probably ten years for those present, and twenty years for those not present, in the same province. If land was acquired by usucapion, so were the servitudes that existed with it, and a servitude lost by disuse might be regained by usucapion. Usucapion applied principally to prædial urban servitudes. It also applied to at least some prædial rural servitudes, and probably to usufructs. (Tit. 3. 4, note; Tit. 4. 1, note.) 8. *Lege*, or express enactment.—This only applied, perhaps, to usufructs, an instance being the acquisition by the father of the usufruct of the son's *peculium* under Justinian's legislation. (Tit. 4. 1, note.)

Extinction of Servitudes.—Servitudes were extinguished in the following ways (Tit. 4. 3, note):—1. *In jure cessio*, the owner of the servitude denying that he owns it (obsolete in time of Justinian). 2. *Confusio* or *consolidatio;* the right to the *res serviens* and the *res dominans*, or to the *dominium* and the usufruct, vesting in the same person. 3. The termination (a) of the rights under which the servitude is enjoyed by the surrender of the servitude to the owner of the *res dominans*, either by agreement or by permitting something that destroyed the servitude; or (b) the termination of the duration of the servitude, i.e. the period for which it has been fixed by the creator. 4. Non-usage; not using it for a period which, previously to Justinian, was two years, and, after Justinian's legislation, was fixed at ten or twenty, according as the parties were present or absent. If the servitude was a prædial urban one, it was necessary that, to free the *res serviens* by *usucapio*, the person affected by the servitude should do some distinct act inconsistent with submission to the servitued

(*usucapio libertatis*). (Tit. 4. 3, note.) In usufructs, if the usufructuary did not use the thing according to the terms of the usufruct, it came to an end. (Tit. 4. 3, note.) *Habitatio* did not cease by non-usage. (Tit. 5. 5, note.) 5. Perishing of the thing in virtue of which, or over which, the servitude was exercised. 6. In the case of usufruct and use, the death or *capitis deminutio* (including, before Justinian, the *minima capitis deminutio*) of the owner of the servitude.

Emphyteusis, Superficies, Pignus.—Before returning to the modes of acquisition of particular things, we have to notice three other incorporeal rights, which naturally connect themselves with personal servitudes:—1. *Jus emphyteuticarium*. 2. *Jus superficiarium*. 3. *Jus pignoris*. (A summary of the law relating to them is given in Tit. 5. 6, note.)*

IV. Usucapion.—The Institutes, as we have said, notice five modes of acquiring *res singulæ*, three being modes of acquiring *jure naturali*, and two being modes of acquiring *jure civili*. We now come to the first of these two latter, viz. usucapion, or the process by which possession ripens into ownership by lapse of time.

It is only civil possession that is capable of so ripening. Civil is opposed to natural possession. If a man has physical control over a thing, detains it, as the jurists say, he is in possession of it; but, to possess it, he must mean to hold it as his own. If he not only is in possession of it, and means to holds it as his own, but if also his possession is *bona fide* and *ex justa causa*, then such possession is civil possession, the possession that in Roman law (*civilis*) gave rise to *usucapio*. If he is merely in possession, or if he has also the *animus possidendi*, but his possession is not *bona fide* and *ex justa causa*, then his possession in either case is only natural, and does not give rise to *usucapio*. The civil possessor and the natural possessor, who had the *animus possidendi*, were protected in their possession by prætorian interdicts, but the person merely in possession was not. (Tit. 6. pr., note.)

With regard to *usucapio*, we have to ask three questions. 1. What things can be acquired by *usucapio?* 2. What is meant by the terms *bona fide* and *ex justa causa*, as applied to possession? 3. What time was requisite to run before *usucapio* ripened the possession into ownership?

1. *What things can be acquired by usucapio?*—At the outset we have to notice a point of great importance. Lands in the *solum provinciale* never could become the property of an individual. The possessor could not, therefore, become the owner of such land by *usucapio*. But after a certain length of possession the prætor protected his possession by allowing a plea, *præscriptio*, of long possession to be effectual in an action brought against him for the recovery of the possession of the land he

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* Where a summary of any distinct portion of law is given in the body of the work, it is not repeated in this general Summary.

held. But as the time was much longer that was required to run for the protection in this way than the time required for *usucapio*, the term *præscriptio*, or *possessio longi temporis*, was used to describe, with regard to the *solum provinciale*, the equivalent of *usucapio* with regard to moveables and *solum Italicum*. There were some differences in their operation; the chief of which were, 1, that *possessio longi temporis* did not give ownership; 2, that *usucapio* was only interrupted by a judgment, *longi temporis possessio* by a *litis contestatio;* and 3, under *usucapio* the thing was acquired subject to its liabilities, i.e. servitudes or mortgages; and under *longi temporis possessio*, it was held free from them. Yet as they were nearly of the same effect, and as the requisites of possession in each case were the same, they are generally spoken of together. (Tit. 6. pr., note.) Under Justinian's legislation (Tit. 6. pr.) the *possessio longi temporis* gave the *dominium*. Moveables, it may be added, could, in all parts of the Roman Empire, be acquired by *usucapio*, and the *possessio longi temporis* did not apply to them. (Tit. 6. pr., note.) We may, therefore, break the first question into two heads. 1. What moveables could be acquired by *usucapio?* 2. What immoveables could be acquired by *usucapio* or *possessio longi temporis?*

Generally speaking, all things *in nostro patrimonio* could be so acquired, but things such as *res sacræ*, or a free man, could not. Nor, as a general rule, could things incorporeal. (1, note.) Things stolen could not be acquired, and a fugitive slave was reckoned among such things. (1.) The thief, of course, could not acquire by *usucapio* what he had stolen; but neither could an innocent holder, and, as theft included every handing over by a person of a thing he knew not to be his, it was rare that moveables could be acquired by *usucapio* (3); but it might happen, as if an heir *bona fide* deals with a thing merely deposited with the testator as if it had belonged to the testator (4), or a usufructuary so deals with the child of a female slave, believing *bona fide* that it is his property. There is no taint of theft, and the thing, when alienated by the heir or usufructuary, may be acquired by *usucapio*. Theft only applied to moveables. (7.) As to immoveables, they could not be acquired by *usucapio* or *longi temporis possessio*, if they were *res vi possessæ*, forcibly seized on (2); but if the possession was originally *sine vi*, but still *mala fide*, e.g. if a person took possession of land left unguarded, knowing it not to be his, and then alienated it to a *bona fide* possessor, this possessor could gain the ownership by *usucapio*, and therefore *usucapio* applied much more frequently to immoveables than to moveables. (7.) *Bona vacantia* (the property of a person dying without successors) belonged to the *fiscus*, and, before being reported on as such, could, but afterwards could not, be acquired by *usucapio*. (9.) Nor could things belonging to pupils or minors or things forming part of a dowry. (10, note.)

2. *What were the requisites of civil possession? What were the conditions possession must fulfil in order for usucapio to operate?*

(1) The thing possessed must not have any *vitium* in it, i.e. must not be of any of those kinds of things which we have just described as incapable of being acquired by *usucapio.* (10.)

(2) The thing must be possessed *ex justa causa*, that is, must have come into the power of the possessor by some recognised legal mode of acquisition, such as sale or gift (10, note); and, if there had been a mistake about this, and the *causa*, or title, was not just, the error, under Justinian's legislation, prevented *usucapio.* (11.)

(3) The possession must be *bona fide;* the possessor must not know that he was possessing what did not belong to him, and, although reasonable ignorance of facts could be permitted, ignorance of leading principles of law could not. In the case of a sale it was necessary that the *bona fides* should exist at the making and also at the performance of the bargain. The general rule was that the possession must be *bona fide* at its commencement. Subsequent discovery of the real facts did not stop the process of *usucapio.* (10, note.) This was equally true, if it was not the same person, but two persons that possessed, one taking from the other, the thing during the time requisite for *usucapio.* If, at its commencement, the possession of the testator was *bona fide*, that of the heir was available for *usucapio*, although the heir knew that the testator had been mistaken. (12.) The times during which two persons held the thing, the one from the other, as in the case of a seller and a buyer, counted together for the purposes of *usucapio.* (13.)

USURPATIO.—The interruption of *usucapio*, the breaking the use, was termed *usurpatio*, as if the possessor lost possession or fell into the power of the enemy, or an action was brought to contest the right, the use being, under Justinian, broken from the time of the first moving of the controversy (*mota controversia*), instead of from the *litis contestatio*, which had no longer the important place it had under the formulary system. (13, note.)

In three exceptional cases the *mala fide* possessor might acquire by *usucapio* :—1, under the old law (altered by Hadrian), if the thing possessed was an inheritance, or part of one, the *mala fide* possessor could in a year acquire the thing, whether moveable or immoveable; 2, so could the original owner of a thing given over in trust as against the fiduciary; and 3, the original owner of a thing sold by the State for non-payment of a mortgage debt could again acquire it, as against the *prædiator*, or purchaser from the State, but in this case two years' possession was necessary for immoveables. (10, note.)

3. *What time was required for the possession to run on in order that usucapio might take effect?*

By the Twelve Tables it was provided that *usucapio* should be completed in two years in the case of immoveables, and in one year in the case of moveables. (Tit. 6. pr.)

The *longi temporis possessio*, introduced by the prætors chiefly for the protection of possessors of provincial lands, required ten years if

the parties were domiciled in the same province, *inter præsentes;* and twenty years if they were not, *inter absentes.* (Tit. 6. pr., note.)

Justinian changed the system generally. He lengthened the time for the acquisition of moveables from one year to three years, and gave the name of *usucapio* to the acquisition of moveables by possession during three years. He made the *longi temporis possessio* apply to lands everywhere (abolishing the distinction between *solum Italicum* and *solum provinciale*), and he made the *longi temporis possessio* give the ownership and not merely bar actions. (Tit. 6. pr., note.)

Possessio longissimi temporis.—There was also *possessio longissimi temporis,* which possession, lasting in the case of ecclesiastical property and mortgaged property in possession of the debtor for forty years, and in other cases for thirty years, enabled the possessor to repel all actions, whatever the defect in the possession might be. (13, note.)

Possession for five years of things purchased from the *fiscus* gave, under an edict of Marcus Aurelius, complete ownership to the purchasers, whatever might be the defects of the possession, as if, for example, there were rights of an owner or mortgagee which the *fiscus* ought to have respected. Those damnified by the action of the *fiscus* were during four years at liberty, under a constitution of Zeno, to seek compensation from the *fiscus,* while the purchasers had under this constitution an incontestable title at once. (14.)

V. Gift.—The second mode of acquisition *jure civili* noticed in the Institutes is gift, but, unless on account of the ceremonies accompanying gifts under Justinian's legislation, it is not properly a mode of acquisition separate from tradition. It is a delivery of a thing from a particular motive. (Tit. 7. pr.) The subject of gifts is treated of under three heads: gifts *mortis causa,* gifts *inter vivos,* and gifts *propter nuptias.*

i. *Donationes mortis causa.*—Gifts on account of death (*donationes mortis causa*) were gifts made in contemplation of death, revocable before the death of the donor, and failing if the donee died first. They might be made in either of two ways. The donor might hand over the thing to the donee, but the gift was not to be completed until the donor was dead; or the donor might hand over the thing, giving it there and then, but bargaining that it was to be restored to him if he did not die on the occasion contemplated. In either case, although he had certainly in the second case lost the *dominium,* the donor was allowed to get back the thing by a real action. (Tit. 7. 1, note.)

Justinian required that a *donatio mortis causa* should be made in the presence of five witnesses. (1, note.)

Donationes mortis causa very closely resembled legacies. They were subjected to the deduction of the Falcidian fourth, and were not valid if the giver was insolvent: but they differed from legacies in the following particulars. 1. They took effect on the death of the donor without its being necessary that the heir should enter. 2. The same

person who could take or could not take the one, could or could not take the other; but capacity was regarded, in the case of *donationes mortis causa*, at the time of the death only, not, as in the case of legacies, also at the time of the disposition. 3. A *filiusfamilias* could, with his father's permission, make *donationes mortis causa*, but could not give legacies of other things than his *peculium castrense*. 4. A *peregrinus* could make *donationes mortis causa*, but could not give legacies. (1, note.)

ii. *Gifts inter vivos* require tradition, but if the intentions of the donor have been manifested he is bound to deliver. A mere agreement to give was not originally binding, but Constantine enacted that such an agreement should be binding if in writing, and Justinian made the agreement binding in every case. Some donations looked on with peculiar favour, such as gifts to or from the emperor, were valid, without anything more than the intention to give being manifested; but other gifts, if exceeding 200 *solidi* previously to Justinian, and 500 *solidi* under his legislation, needed to be registered by public deeds. Gifts requiring to be registered were, however, valid up to the limit below which registration was not necessary. Gifts, as a rule, were not revocable; but Justinian made them revocable in case of the ingratitude of the donee. (2.)

iii. *Gifts propter nuptias.*—Gifts between husband and wife were prohibited by law. But as an equivalent to the *dos* contributed by the wife, the husband frequently made a gift before marriage, *donatio ante nuptias*, which was the inalienable property of the wife managed by the husband; and this donation might, like the *dos*, be increased after marriage. Justinian enacted that such gifts, like *dotes*, might be not only increased, but made after marriage, and should receive the more appropriate name of *donationes propter*, instead of *ante, nuptias*. The wife, if survivor, received a portion of the *donatio*, equal in quantity before Justinian, and in value under Justinian, to that which the husband, if survivor, would have received out of the *dos*. (3, note.)

Justinian, in closing the subject of the mode of acquiring particular things by the civil law, notices that there had been at one time a mode of acquiring *per jus accrescendi*, which took effect when one joint owner of a slave enfranchised him in such a way that, if the enfranchisement had been effectual, the slave would have become a citizen; the share of the enfranchising owner passed by accrual to the other owner, and this other owner became the sole owner of the slave. Justinian did away with this by enacting that in such a case the slave should be free, and the other part-owner should receive a pecuniary compensation from the enfranchising part-owner. (4.)

Before passing to consider the modes of acquiring groups of things, the Institutes deal with two subsidiary subjects, viz. 1, Separation from ownership of the power of alienation, and 2, Acquisition through others.

i. Separation from Ownership of the Power of Alienation.

1. *A person who is owner cannot always alienate.* Two instances are given. (*a*) A husband cannot alienate immoveables forming part of

the *dos* of his wife, although the ownership is in him. The *lex Julia* prevented a husband selling such immoveables, when *in Italico solo*, without his wife's consent, or mortgaging them with her consent. Justinian enacted that immoveables, forming part of the *dos*, wherever situated, could not be sold or mortgaged by the husband, even with the consent of the wife. (Tit. 8. pr.)

(*b*) A pupil cannot, without the authorisation of the tutor, alienate.

The pupil could not transfer the property in anything belonging to him, but he could acquire the property in anything transferred to him. Three illustrations of this doctrine are given.

(a) A pupil unauthorised could not enter into the contract of *mutuum*, i.e. could not lend a thing so that the thing lent became the property of the person to whom it was lent, he in his turn having to give as much back. If the pupil made such a contract, he could by a real action get the thing back, if not consumed; if consumed *bona fide* he could recover the value of it by a *condictio;* if consumed *mala fide*, he could get not only the value, but damages by an *actio ad exhibendum.*

(b) If the pupil unauthorised paid a debt, he could not make the money paid belong to the creditor. It was still his, and if not spent might be got back by a real action from the creditor; if spent *bona fide*, the debt due by the pupil was considered as liquidated; if spent *mala fide*, the pupil would have an *actio ad exhibendum.*

(c) If a debtor made a payment to a pupil without the tutor authorising the payment, the money paid became the property of the pupil, and the debt still remained unextinguished. If the pupil sued for the sum owing, the debtor could only repel the action to the extent to which the pupil then had the money in hand, and if the pupil had spent it all, the debtor had to pay over again. Even if the tutor authorised the payment, the debtor was not quite safe, for the tutor might not hand over to the pupil the money paid; and then the prætor might give a *restitutio in integrum*, placing the pupil in the position in which he would have been if the debt had not been paid, and so the creditor might have to pay over again. To obviate this risk, Justinian enacted that if the debtor paid under the authority of a judicial order, which was to be given gratis, he was to be absolutely secure, and under no circumstances could he have to pay again. (Tit. 8. 2.)

2. *A person not owner can sometimes alienate.* The instance given is that of a creditor who has a power (of which he cannot be deprived even by agreement) of selling the thing pledged or mortgaged (*pignus, hypotheca*). Justinian enacted, that unless the parties otherwise agreed, the sale should take place two years after notice to pay; and in two years more, if no purchaser could be found, the creditor should be considered the owner. (Tit. 8. 1, note.)

ii. ACQUISITION THROUGH OTHERS.—We may acquire through, 1, *filiifamiliarum;* 2, slaves belonging to us, and, to a certain extent, slaves of whom we have the usufruct; 3, procurators.

1. *Acquisition through filiifamiliarum.*—The old rule of law was that everything acquired by a *filiusfamilias* was acquired for and belonged to the *paterfamilias.* The son might have a *peculium* or property under his control, which, so far as third persons went, who could sue and recover to the extent of the *peculium,* was like the son's property; but the father remained the legal owner of it, and it was only under the son's control because the father permitted this. The first change was the introduction of the PECULIUM CASTRENSE, dating from the beginning of the empire, consisting of everything given to a son on setting out for military service, or acquired while that service lasted. This *peculium* was the son's; he could dispose of it as he pleased in his lifetime or by testament, but if he did not dispose of it by testament, then his father took it not as the heir of the son, but as the claimant of a *peculium.* Justinian, however, allowed the children or brother of the *filiusfamilias* to take the *peculium* before the father. The next change was the introduction by Constantine, or perhaps previously, of the PECULIUM QUASI-CASTRENSE, i.e. property acquired by the son in personal attendance on the emperor; and this *peculium* too could, under Justinian, be, like the *castrense,* given by testament. (Tit. 9. 1, note.)

Lastly, Constantine introduced the PECULIUM ADVENTITIUM, which, having been previously confined to property coming from a mother or maternal ancestor, or husband or wife, was made by Justinian to include all property coming to the *filiusfamilias,* except the *peculium profectitium,* i.e. the property coming to him from the father himself. Of this *peculium adventitium* the son had the ownership, the father the usufruct. (Tit. 9. 1.) From the *peculium* falling under the three above heads as not belonging to the father, a third used to be deducted by the father when he emancipated the son. Justinian gave the father the usufruct of half, instead of the ownership of a third, of such *peculium,* in case of emancipation. (2.)

2. *Acquisition through slaves.*—(*a*) The slave stipulates for the master's benefit, but cannot make his master's position worse. The slave enters on an inheritance only if the master directs him, for the inheritance may be such as to cause loss. The slave takes a legacy for the benefit of the master whose slave he was at the date of the decease of the testator. The slave possesses for the master, who must have knowledge of the possession and supply the *animus,* the slave only being capable of physical detention—except when the slave possessed a thing as part of his *peculium;* for the master, in allowing him to create this *peculium* (which always belonged to the master), has exercised the *animus* necessary for possession. And what is here said of the slave may, with the necessary exceptions as to the *peculia castrensia, quasi-castrensia,* and *adventitia,* be said of the *filiusfamilias,* who equally stipulated for his father's benefit, could not make his father's position worse, took inheritances only under his father's direction, received legacies for his father's benefit, and possessed

physically for his father, but needed his father's *animus possidendi*. (3, note.)

(*b*) Through slaves of whom any one has the usufruct, he acquires whatever they acquire (including possession as well as ownership) by means of anything belonging to the usufructuary or by their own labour. Everything else which they acquire, as for example an inheritance or a legacy, is acquired for their owner. The same may be said of a slave possessed *bona fide*, but who is really not the slave of the possessor, either as being free or belonging to another. If the slave possessed *bona fide* becomes in time the property of the possessor by *usucapio* (which cannot happen in case of a slave of whom there is a usufruct), he acquires thenceforth everything for the owner by *usucapio*. (4.)

3. *Acquisition through procurators.*—On the other hand, a man could not acquire by means of free persons not in his power or possessed by him *bona fide*, nor by slaves belonging to another, of whom he had neither the usufruct nor the *bona fide* possession. He could acquire nothing '*per extraneam personam*,' except that a procurator could acquire possession for his principal, even when his principal did not know of the acquisition, and then if the thing possessed was handed over by the owner, the ownership was acquired by the principal in any case, but if it was not handed over, then the *usucapio* began to run on behalf of the principal only from the time when he knew of and adopted the possession. (5.)

Testaments.

We now come to the first mode of acquiring *universitates rerum*, viz. by testament, and this subject occupies the rest of the Second Book.

We have to consider (1) *the legal position of the maker of the testament:* (*a*) how he must make it, which will vary according as he is or is not a soldier; (*b*) who are legally incapable of making wills; (*c*) the duties and powers of the testator as to the disinherison, institution, and substitution of heirs; (*d*) the causes that make a testament invalid; and (2) *the legal position of those who take under a testament*, that is, of (*a*) heirs, (*b*) legatees, and (*c*) those who receive or benefit by a trust.

I. Legal Position of the Maker of the Testament.

1. Form of the Testament.—In the earliest period of Roman law, a testament might be made (*a*) in the *calata comitia*, called twice a year for this purpose, where the *gentes* watched over the transfer of the *hereditas*, or (*b*) *in procinctu*, in time of war, when an army was setting out to fight. Then a new form of will was introduced in the shape of a fictitious sale, by which originally the heir figuring as the *familiæ emptor* bought the inheritance from the testator in the presence of the holder of the scales and five witnesses. Afterwards the *familiæ emptor* became merely an outsider, going through the ceremony for the

benefit of the heir, whose name was concealed during the lifetime of the testator. (Tit. 10. 1.)

Then came the prætorian testament. The form of sale was no longer required. The *libripens* and the *familiæ emptor* became two additional witnesses, making seven in all, but the seven witnesses had to go through a new formality. They had to seal the testament with their seals. (2.)

Lastly came the imperial form of will introduced in the fifth century by Theodosius the Second. Here a new precaution was introduced: the seven witnesses had not only to seal, but to subscribe the testament, and so had the testator, or, if he could not write, an eighth witness had to subscribe for him. This testament was said to be *tripartitum*, that is, taking its origin from three sources. The necessity for the testament being made at one single time, and the necessity of the presence of seven witnesses, came from the old civil law; the sealing of the testament by the witnesses came from prætorian law; the subscription of the witnesses and the testator came from imperial law. (3.) Justinian added, and subsequently abolished, another requirement, that the name of the heir should be in the handwriting of the testator or of one of the witnesses. (4.)

It made no difference what seal the witnesses used, and before the time of Theodosius and Valentinian they used, and after that time they were obliged, to write by the side of the mark of their seal their names and the name of the testator. (5, and 2, note.)

Any one, as a general rule, could be a witness with whom the testator had *testamenti factio*, i.e. to whom he could leave his inheritance. But there were exceptions: such as women, children below the age of puberty, slaves, the mad, the deaf, the dumb, and persons considered as *intestabiles* on account of having committed certain offences, such as writing libels or denying their signature to a former testament which they had witnessed. (6.) A testament would, however, be valid, although witnessed by a slave, if, at the time of witnessing it, he was reputed to be free. (7.) Members of the same family might be witnesses of the same testament (8); but the *filiusfamilias* could not be a witness of the father's testament, nor could the father be a witness of the son's testament affecting his *peculium castrense*. (9.) Neither the heir nor any one in the same family with him could be a witness—but legatees and *fideicommissarii*, and those connected with them, might. (10, 11.)

The testament might be written on any material, wax, parchment, &c. (12); and any number of copies of a testament might be made. (13.) A testament need not be made in writing at all. It might be merely nuncupative, that is, the testator might orally declare his wishes in the presence of seven witnesses. (14.)

Military Testaments.—Special privileges, however, as to making testaments were accorded to soldiers by Julius Cæsar, and confirmed by other emperors. A soldier, while serving in a campaign, was not re-

quired to observe the formalities incumbent on civilians; and this applied to a soldier *filiusfamilias* making a testament as to his *peculium castrense*. But if he was not in a campaign, the *filiusfamilias* had to observe the usual formalities. Under Justinian it was undoubtedly necessary that the soldier's testament should be made during a campaign, but whether this had previously been the law is doubtful. (Tit. 11. pr.)

The following were the chief privileges of soldiers with regard to military testaments: (*a*) All that was necessary for the validity of a soldier's testament was that he should have meant in some way to express his testamentary intentions; if orally, in the presence of a witness. (*b*) Any words would suffice to institute his heir. (Tit. 11. 1.) (*c*) The soldier might die partly testate and partly intestate. (6, note.) (*d*) He need not disinherit his children by name. (Tit. 13. 6.) (*e*) His testament would not be rendered invalid by those causes which would render invalid the testament of a civilian (*paganus*), and his testament, however informally made, would suffice for revocation of a previous testament. (Tit. 17. 2, note.) (*f*) He could institute as heirs persons generally incapacitated, such as *deportati* and *peregrini*. (Tit. 11. 6, note.) (*g*) He could give more than three-fourths of his property in legacies. (Tit. 22. 3, note.) (*h*) He could dispose of the inheritance by codicils. (Tit. 11. 6, note.) (*i*) He might make a testament although deaf or dumb. (2.) (*j*) A testament made irregularly before he acquired the power of making a military testament became valid as the expression of his wishes after he had acquired that power. (4.) (*k*) Nor did a *minima capitis deminutio* affect the validity of a military testament, nor the two greater kinds, if inflicted for merely military offences. (5, note.) (*l*) The rule treating institutions *ex certo tempore* or *ad certum tempus* as a superfluity did not extend to military testaments. (Tit. 14. 9.) (*m*) Soldiers could make a testament for their children without having made their own, and could substitute to emancipated children and to strangers. (Tit. 16. 9, note.)

The testament of a soldier made without the forms required from civilians remained in force for a year after his discharge (*post missionem*); and if he inserted a condition that could not be fulfilled within a year, yet his testament was valid, supposing he died while he could make a military testament. After a year from his discharge had elapsed, he was obliged, to die testate, to make a testament with the ordinary forms. (Tit. 11. 3.)

2. Persons incapable of Testation.—All persons, however, could not make testaments. This power was confined to Roman citizens *sui juris*. The *filiusfamilias* could, however, dispose by testament of his *peculium castrense*, and this privilege was first in some, and then in all, cases extended to the *peculium quasi-castrense* (Tit. 12. pr.; Tit. 11. 6); the father taking these *peculia*, however, by the *patria potestas*, if the son died intestate leaving no child or brother. (Tit. 12. pr.) Children under age, mad persons, except in lucid intervals (1); inter-

dicted prodigals (2); deaf and dumb and blind people, except under special precautions provided by the emperors (3, 4), could not make testaments.

Captivity.—A testament made by a man during captivity was invalid, but a testament made before he became captive was valid, by the *jus postliminii*, if he returned; or if he died, by a deduction from the terms of the *lex Cornelia*, punishing the forgery of the testament of a person dying in captivity. It was argued that a testament made by a person who subsequently died in captivity must be valid, or the law would not punish a forgery of such a testament. (5, note.)

3. We now come to the rules as to the (*a*) disinherison, (*b*) institution, and (*c*) substitution of heirs.

(*a*) DISINHERISON.—The *sui heredes* of the testator, i.e. those persons who were made *sui juris* by his death, had such an interest in the inheritance that if he wished to exclude them he must do so expressly. He had to exclude his sons by name, and if he did not, the testament was wholly invalid. Other *sui heredes*, such as daughters, he might exclude by the general term *ceteri exheredes sunto;* but if he did not do this, then the testament was not invalid, but these excluded *sui heredes* took by a kind of accrual their proper share, if the instituted heirs were *sui heredes*, and half the inheritance if the instituted heirs were strangers. (Tit. 13. pr., note.)

The birth of a new *suus heres* after the testament had been made introduced a new participator in the inheritance, and unless this person was expressly disinherited by anticipation, the testament was made invalid. The term posthumous was in strictness applied to any person born after the death of the testator. In the theory of law, *postumi* were *incertæ personæ*, and could not be instituted or disinherited; but the civil law permitted the institution of *postumi sui heredes*, born after the death of the testator (1, note); and the *lex Junia Velleia* permitted the institution of *postumi sui heredes*, conceived before and born after the date of the testament, but born before the testator's death (*postumi Velleiani*). (2, note.) And *postumi* who could be instituted must be disinherited. The jurist Gallus Aquilius invented a form of institution by which the case was met of a son dying in the testator's lifetime, and then the testator dying, and then there being a posthumous son of the son, who would be a *suus heres* of the testator. (1, note.)

There was also another way in which new *sui heredes* might come into existence after the date of the testament. A son might die in the lifetime of the testator, and then the children of that son would pass into the rank of *sui heredes*. The *lex Junia Velleia*, by a further provision, permitted the disinherison of all such children, who were said to be *postumorum loco* (*postumi quasi Velleiani*). (2, note.)

The disinherison of *postumi* had to be made *nominatim : Quicumque mihi filius genitus fuerit exheres esto.* (1.) *Postumæ* might be disinherited by the general *ceteri* clause. It was, however, necessary that the *postumæ*, if disinherited by the general clause, should have some-

thing left them, to show they were not passed over through forgetfulness. (1.) Other persons, who came into the family after the date of the testament, such as children subsequently adopted, and children both conceived and born after the date of the testament, in the lifetime of the testator, necessarily invalidated the testament. (2, note.)

So far we have been considering the provisions of the civil law. The prætor also came to the aid of those who were not, in his opinion, properly disinherited, by giving them *bonorum possessio contra tabulas*. (3.)

If a daughter or a grandchild was omitted, the prætor permitted the testament to be set altogether aside, but the Emperor Antoninus made a distinction, and allowed the daughter to have only what she would take by the *jus accrescendi*, that is, her share, which, if the instituted heir was a stranger, would be one-half, whereas the grandson, if omitted, could get the testament set aside, and would take all the inheritance, as against an instituted stranger. (3, note.)

Under the prætorian law grandsons as well as sons must be disinherited *nominatim*. (3, note.) Perhaps also the prætor did not permit the testament to be set aside because a son had not been properly disinherited who died in the lifetime of the testator, although the law is laid down by Justinian positively to this effect, that the testament was *ipso facto* invalid in such a case. (Tit. 13. pr. and 3, note.)

The prætor required all sons and grandsons to be disinherited, whether they were or were not in the power of the testator, provided they were not in another family. This included those emancipated (3), and those given in adoption and subsequently emancipated by the adoptive father. (4.) The emancipated son, however, had to bring into account the property he had acquired since emancipation, if the effect of his getting the testament set aside was injurious to a properly instituted *suus heres*. (3, note.)

Justinian made some further changes. 1. He required the child and the grandchild, male or female, whom it was necessary to disinherit at all, to be disinherited *nominatim*. (5.) 2. In case this was not done, the testament was absolutely invalid. There was no longer any *jus accrescendi* for daughters and grandchildren. (5.) 3. The testator was obliged to disinherit *nominatim* his child given in adoption to any one but an ascendant. (5, note.)

Soldiers *in expeditione* were not obliged to disinherit expressly any one. (6.) Mothers and maternal ancestors, also, were not obliged to disinherit expressly those who would have taken their inheritance *ab intestato*. Their silence was sufficient; but then these persons, if unjustly passed over, might present a *querela inofficiosi testamenti*, just as those might who, although disinherited in due form, complained that their disinherison was unjust. (7.)

(*b*) INSTITUTION.—The institution of the heir was the basis of the whole testament. In the old law some such formal phrase as *Titius heres esto* was considered necessary; but, under the empire, any form of institution would suffice. (Tit. 14. pr., note.)

Who could be instituted.—Those only could be instituted heirs who had the *testamenti factio* with the testator, who had, in the old language of the law, the *commercium* with him. Many persons, however, who had not the *testamenti factio* in the sense of being able to make a testament, had the *testamenti factio* in the sense of being capable of being instituted as heirs, as, for instance, persons below the age of puberty. Among those who could not be instituted were *peregrini*, *deportati*, and uncertain persons; an example of an uncertain person being 'whoever shall marry my daughter,' but a person whom the testator had not seen was not an uncertain person. (12.) The institution of uncertain persons was permitted by Justinian. Further, it was not permitted to institute municipalities; the gods, with certain exceptions, and so forth; and, under the law of Justinian, certain others, as apostates, heretics, or persons whose institution seemed contrary to the rules of law or of justice as to marriage; and, though *cœlibes* and *orbi* could be instituted as heirs, the former took (unless of an age too young for marriage, or in case of near relationship to the testator) nothing, and the latter only half of what was given them by the testament, so long as the *lex Papia Poppœa*, abolished by Constantine, was in force. (Tit. 10. 6, note.)

Institution of Slaves.—The master might institute his slave, and, under Justinian, without expressly enfranchising him, and Justinian permitted the institution of a slave in whom the testator had only a bare ownership, the slave having, however, still to serve the usufructuary; but a mistress could not institute, and so enfranchise, a slave accused of adultery with her. (Tit. 14. pr.) The slave of the testator, if instituted, was obliged to take the inheritance, if not emancipated before the testator's death.

If the testator instituted the slave of another, the master of the slave decided whether the slave should accept the inheritance, and the slave took it for his master, or masters, if there were several, rateably (3); and if the master of the slave was dead, the slave could take the inheritance of the testator for the benefit of his dead master's inheritance. (2.) In order to decide, in cases of the slave being alienated, for what master the inheritance was taken, it was necessary to look to the time when the inheritance was actually accepted, as the slave took the inheritance for the master to whom he then belonged. (1.)

A testator might appoint one heir, or as many as he pleased. (4.)

Calculation of the parts of an inheritance.—The calculation of the parts into which the testator divided the inheritance was made in the terms of the *as*, its multiples and its fractions. The real *as* contained twelve ounces, but the testamentary *as*, or unit of the inheritance, was held to contain as many ounces as the testator pleased. A person could not die partly testate and partly intestate, and so, if a testator instituted only one heir and gave him six ounces, it was held that the *as* in this case only contained six ounces, and he took the whole. (5.) If he instituted several heirs, and the number of parts, or ounces, he gave

to each came, in the whole, to 11 or 13, this was taken to be the number included in the *as*. But if he gave two parts to one, and two to another, and instituted a third heir, without expressing how many parts were given him, then recourse was had to the normal *as*, and this third heir had the number of parts (eight) necessary to make up the twelve ounces of the *as*; or if the parts given reached, or exceeded, twelve, then the testator was supposed to have had the double *as*, or *dupondius*, in mind, and the instituted heir, to whom no express number of parts was given, took the number of parts necessary to make up the *dupondius*, i.e. if twelve were given, he took twelve, or one half of the inheritance, and, if more than twelve, as thirteen or twenty-five, were given, then he took enough parts to make up the *dupondius*, or, if necessary, the *tripondius*. The fractions of the *dupondius* or *tripondius* could, of course, be brought back to fractions of the *as*. (6, 7, 8.)

Conditional Institution.—*Sui heredes* could not be instituted conditionally unless the condition was one in their own power to fulfil, and was one lawful to carry out, but other heirs might be instituted conditionally. (9.) An impossible condition—and conditions of a kind contrary to law or *boni mores* were reckoned among impossible conditions —was treated simply as if it had not been inserted at all, and the institution was valid. (10.) So too, if an heir was instituted from, or to, a certain time, this was treated as something altogether superfluous, for to say that a man, after a date, or up to a date, should be heir, offended the rule that a testator could not die partly testate, and also the rule *semel heres semper heres*. But if the time was uncertain, in the sense that the heir was to be heir when a thing did happen that must happen some time, as when A died, this uncertain time was looked on merely as a condition, and the inheritance was in abeyance until it was seen whether the instituted heir survived A. If he did, he entered on the inheritance, and, in all cases, when an heir entered on a condition being fulfilled, his rights were made, by his entering, to date back to the time of the death of the testator.

(*c*) SUBSTITUTION, which was either ordinary, or to a pupil. *Substitutio vulgaris*, as opposed to *pupillaris*, was the institution of another heir in case the heir first named did not take; and the law allowed any number of such substitutions, to which resort was had, partly from the prevailing wish not to die intestate, and partly because, while the *lex Julia et Papia Poppœa* was in operation, the testator, by substituting an heir, could give to a person he wished to benefit the share of an instituted heir disqualified from taking under this law. (Tit. 15. pr. and 1, notes.)

One important use of the power of substitution was that which regarded co-heirs. Three instances are given which show the benefits of substitution to co-heirs. i. Their position, if substituted to each other, was better than their position under the law of accrual, *jus accrescendi*. For though the share of an instituted heir who did not take it passed to co-heirs by the right of accrual, the effect was not the same as in

case of substitution, for those substituted had a liberty of choice as to taking this vacant share, whereas they must take what accrued to them.

ii. The surviving substituted co-heirs might possibly get more in the case of one of their number dying, for one co-heir might die after entering on his own share of the inheritance, but before the share of a co-heir subsequently renouncing was offered him. If there was no substitution, the heirs of this co-heir would take by accrual the vacant share; but the benefit of substitution was personal. If the co-heir did not live to take the vacant share, it did not go to his heirs, but went to the surviving co-heirs, who thus had the advantage of excluding his heirs.

iii. Under the *lex Julia et Papia* some persons might take what was given them as co-heirs, who could not take *caduca*. Substitution might be beneficial to them, and they took as substituted heirs what they were disqualified from claiming as *caduca*. (1, note.)

Unless the testator otherwise provided, substituted co-heirs, if instituted with unequal shares, took the same unequal shares of what they got by substitution. (2.) If one of two co-heirs is substituted to the other, and a third person is substituted to the substituted co-heir, the third person is taken to be substituted also to the other co-heir, and, if both co-heirs die, takes the shares of both, although the co-heir to whom he was expressly substituted, died first. (3.) If a testator substituted an heir to an instituted heir, who, really a slave, was thought by the testator to be free, the master of the instituted slave and the substituted heir were permitted, by a kind of rough equity, each to take half. (4.)

Substitutio pupillaris.—Custom had also sanctioned what was termed *pupillaris substitutio.* A testator might, but only as a part of his own testament (Tit. 16. 5), substitute to each or to any of his children in his power at the time of making the testament and at his death (including posthumous children) (4), if they became heirs, but died under the legal age of puberty, or any previous date fixed by the testator (8); and a person substituted (whether specially named, or generally, as whoever might be the heir of the testator) (7) to such a child, was considered to be substituted both by *vulgaris substitutio*, so that he took if the child never lived to take the inheritance, and by *pupillaris substitutio*, so that he took if the child lived to take the inheritance but died under puberty. (Tit. 16. pr.) A substitution (*quasi-pupillaris*), framed on the model of the *pupillaris*, permitted any ascendant to substitute to persons of puberty deprived of reason any one of the descendants, or, if there were none, one of the brothers of the insane. (1.) By *pupillaris substitutio* the one testament of the father operated on two inheritances, and the substituted heir took all the inheritance of the son, and not only that which came from the father. (2.) The father might, if he thought proper, substitute, without letting the name of the substituted heir be known, unless the son died within the age of puberty, so as to guard against the substituted heir knowing that he had an interest in the death of the child. (3.) Fathers

might substitute to disinherited children, but not to emancipated, as they were no longer in the testator's power, and the *patria potestas* was the basis of the custom. (4, note.) If the *impubes* was arrogated, the substitution was at an end, but the arrogator was obliged to undertake, in case the child died *impubes*, to give up to the substituted heir all he would have taken if the substitution had remained in force. (4.)

As the basis of the custom was the *patria potestas*, a father could not substitute to a stranger or to a son above the age of puberty. All he could do was to impose a *fideicommissum* on the person instituted, binding him, if he died within a certain time, to give back that which came to him from the testator to the person whom the testator wished in that case to benefit. (9.)

4. Causes that made a Testament invalid.—A testament legally made remained valid until revoked (*ruptum*) or rendered ineffectual (*irritum*). (Tit. 17. pr.)

(*a*) *Testamentum ruptum.*—A testament was revoked (*ruptum*), 1, by the subsequent arrogation or (if the testator was an ascendant) adoption of a *suus heres*, unless the new *suus heres* had been instituted by anticipation. (1.) 2. By the testator subsequently making another testament validly made or made in any way under which there could have been an heir. (2.) If the heir under the second testament could take *ab intestato*, the second testament, although not made with sufficient formalities, revoked the first, and was treated as an expression of the testator's wishes binding on the *heres ab intestato*. (2, note.) 3. The testament was also revoked by the testator tearing or defacing it, or, if it had been made ten years when the testator died, by the testator having before witnesses, or by a deed, signified his wish that it should not remain in force. (2, note.) If the heir in the second testament was instituted for certain things only, and it was declared that the first testament should be valid, the first testament was revoked, but the heir in the second had to content himself with the things so given him, or with a fourth of the inheritance, as would be most favourable, and had to restore the rest of the inheritance to the heirs instituted in the first testament. (3.)

Testamentum irritum—A testament was rendered ineffectual (*irritum*) by the testator subsequently undergoing a *capitis deminutio*. But if the testator had reverted to his former position, and had been a citizen and *sui juris* at the time of his death, then the prætor would give the heir instituted in his testament *bonorum possessio secundum tabulas*, a distinct expression of the testator's wish to that effect being, however, required in case a testator who was arrogated after making the testament had been subsequently emancipated. (6, note.) The emperors, after Pertinax, would not accept an inheritance when they were instituted on account of a suit, or to cure the informality of an informal testament, or if instituted by word of mouth. (8.)

(*b*) Querela inofficiosi testamenti.—Under the general head of the invalidity of testaments we have to notice the special cases when

a testament would be attacked as *inofficiosum*. There were certain persons who might bring an action called the *querela inofficiosi testamenti* before the *centumviri*, to have the testament set aside, although it was formally perfect. The ground of the action was that the testator had not done his duty by them in his testament, and that he had cast a slur on their good fame by unjustly excluding them from sharing the inheritance, and, if this was made out, the testament was set aside under the fiction that the testator could not have been of sound mind when he made his testament. (Tit. 18. pr.)

On the ground of being unjustly disinherited or omitted, children, including posthumous children and children adopted by an ascendant (2), might attack the testaments of fathers or grandfathers in whose power they were. (Tit. 18. pr.)

On the ground of being unjustly omitted, children might attack the testament of their mother, and grandchildren those of their maternal grandfather. (Tit. 18. pr., note.)

Parents might, if omitted, attack the testaments of their children; and if infamous persons were preferred to them, brothers and sisters of the testator might attack the testament, and this liberty, which originally was given only if the tie of agnation continued, was extended by Justinian to brothers and sisters, if the tie of agnation had ceased, and even to brothers and sisters of the half blood on either side. (1, note.) No more distant relation could bring the action, nor could any one bring it, unless as a last resource, and if he could not get anything any other way. An arrogated pupil, for example, disinherited by the arrogator, had the *quarta Antonina*, and so could not bring the *querela de inofficioso*. (2, note.)

Portio legitima.—No one, if anything whatever was left to him by the testament, could attack it as *inofficiosum*. But he had a right to bring the *actio in supplementum legitimæ*, to have that which was left to him made up, if below, to the fourth part of that which he would have taken *ab intestato*. Before Justinian, if the gift to him had not reached the amount of this fourth, he could attack the testament, unless the testator had directed that the deficiency should be made up to him. Justinian directed the fourth to be made up without the direction on the part of the testator. (3. and note.)

If a person received the fourth part in any way under the testament, as heir, legatee, or *fideicommissarius*, or by a *donatio mortis causa*, or had received it by a *donatio inter vivos*, expressly as this fourth, or for the purchase of military rank, or had received it from a parent, as part of a *dos* or *donatio ante nuptias*, this person could not attack as *inofficiosum* the testament of the person from whom the part was thus received. (6, and 7, note.)

If there were several persons entitled to bring the action, each was to have the fourth of what he would have taken *ab intestato*. (7.)

Extinction of the action.—The right to bring the *actio de inofficioso* was extinguished, 1. By the person entitled to the *quarta legitima*

having died without having manifested an intention to dispute the testament; if he had done so, the action passed to his heirs. 2. If he had allowed a certain time, at first fixed at two years, and afterwards at five years, to elapse without bringing the action. 3. By acquiescing directly or indirectly in the testament (7, note); but a tutor who had acquiesced in the testament on behalf of his pupil might still attack the testament on his own account (4), just as, if he had attacked the testament on behalf of the pupil unsuccessfully, he did not lose to the *fiscus* what was given to himself, this being the usual penalty of unsuccessful attack. (5.)

System of the Novels.—Justinian in the Novels introduced a new system. (7, note.)

1. The *portio legitima* was fixed in a new way. If the number of those who could claim it was four or a less number, then they were all together entitled to one-third of the testator's whole inheritance, which third they shared between them; if more than four, to one-half.

2. Those entitled to receive a *portio legitima* must be instituted as heirs, and it was not enough to prevent the testament being attacked as *inofficiosum*, that they got their portions in some other way than as heirs.

3. If the testament was set aside as to the heirs, it still remained in force for all else, for trusts, legacies, and so forth.

4. The causes of just disinherison were enumerated, and on a specified one of these the testator must express himself to be acting.

II. Legal Position of those taking under a Testament.

This is the second head of testamentary law, the legal position of the testator having been the first. Those taking under a testament were, 1, Heirs; 2, Legatees; 3, *Fideicommissarii.*

I. Heirs.—Heirs are of three kinds: (1) *Necessarii;* (2) *Sui et necessarii;* and (3) *Extranei.* (Tit. 19. pr.)

Heredes Necessarii.—The *heres necessarius* was a slave instituted by his master. He became at once free on the death of the testator, and he had no option as to taking the inheritance. He was obliged to take it (*necessarius*), and the object of the institution was that the testator might be sure of having a testamentary heir, so that if the testator was insolvent, his goods might be sold, not as his, but as those of the heir, and thus the testator's memory be saved the disgrace of such a sale. (Tit. 19. 1.)

The *heres necessarius* might claim the *beneficium separationis*, that is, to have his property acquired after the death of the testator, or anything due to him from the testator, kept distinct from the property of the testator, and free from claims against the testator's inheritance. (1, note.)

Sui Heredes.—*Sui et necessarii heredes* are the descendants of the testator, in his power at the time of his death, and not having any one preceding them in whose power they became by the death of the testator, as would be the case with the testator's grandson who had a living father. (2.)

Sui heredes were so called because they were, even in the lifetime of the *paterfamilias*, looked on as in a manner partners in the inheritance. They were, so to speak, heirs to their own inheritance; and the inheritance came to them without their entering on it, or wishing to have it, or proving that it came to them. They were, in the old civil law, obliged to take the inheritance, but the prætor gave them the *beneficium abstinendi*—that is, allowed them to abstain if they pleased—and unless they mixed themselves up with the inheritance, the prætor inferred from their holding aloof that they wished to abstain, and then, if the goods were sold, they were sold in the name of the testator, and no actions could be brought against the *suus heres* as heir, although, if he pleased, he might afterwards alter his mind and accept the inheritance. (2, note.)

Extranei Heredes.—Heirs not subject to the power of the testator are termed stranger heirs, *extranei heredes.* Children not within his power if instituted, children instituted by the mother, slaves instituted and subsequently manumitted, are *extranei.* (3.) These heirs were required to have the *testamenti factio* (in the sense, not of being able to make a testament, but of being able to take under a testament) at three epochs, (*a*) the making of the testament; (*b*) the death of the testator; (*c*) the entering of the heir on the inheritance. (4.) If his capacity was lost and regained between the first two of these epochs, the heir could enter on the inheritance, but not so if the loss and regaining took place between the second and third epochs. (4, note.) The *extraneus heres* was at liberty to accept or renounce the inheritance.

Entering on the Inheritance. Cretio.—How did the heir accept it? First, there was a method of instituting, obsolete by the time of Justinian, in which there was a *cretio*, or direction to the heir, to make up his mind within a given time, either from the date at which he knew of his rights and could exercise them, *cretio vulgaris*, or from the date at which his rights accrued to him, *cretio continua.* The heir, within the time fixed, could alter his mind. If he accepted, he announced his acceptance in a solemn form. (7, note.)

Ordinarily the heir entered on the inheritance either by doing some act as heir (*pro herede gerere*) or by the mere expression of his willingness to be heir. (7.) The heir, in acting as heir, must know that he is heir, and that the testator is dead. (7.)

There was no fixed time in which the heir must make his decision; but the prætor would, on application, fix the time, allowing not less than one hundred days, and Justinian enacted that it should not exceed nine months, or, by imperial favour, a year. If the heir did not decide within the time, he was, in an action on the part of the *heredes ab intestato*, taken to have rejected, and, in an action on the part of creditors, to have accepted, the inheritance. (5, note.)

A person could not enter for another, nor on part of an inheritance, nor conditionally; if he entered he succeeded to the *persona* of the deceased. (7, note.)

If the *extraneus heres* accepted, he could, if under twenty-five years, be relieved from his position, if a disadvantageous one, by the prætor giving a *restitutio in integrum.* (5.) If he was over twenty-five, he could not be relieved, and must abide by all the consequences of accepting the inheritance, including the liability to pay the debts of the testator; but on a very special occasion, Hadrian relaxed this rule, and Gordian ordered that it should never be enforced against soldiers. (6.) Justinian introduced a new system by which the heirs might enter on the inheritance of even an insolvent testator without risk. The heir might claim to have an inventory made (*beneficium inventarii*) of the inheritance, this inventory to be begun within thirty, and finished within ninety, days of the time when he became acquainted with his rights and could exercise them, and made in the presence of a notary or three witnesses. Out of the property specified in the inventory he had to pay the creditors, paying himself anything that might be due to him. If the property was more than sufficient, he took the surplus. If insufficient, his own estate was in no way liable. (6, note.)

II. Legatees.—Although legacies constitute a title to particular things, not to groups of things, it is convenient to treat of legacies while treating of testaments. (Tit. 20. pr.) A legacy is a gift left by a deceased person (1), and the subject of legacies may be treated under six heads.

1. *General Notions as to Legacies and their Forms.* (*A*) *Forms.*—In the old law there were four modes of giving legacies: (*a*) *per vindicationem*, when the testator gave (*Stichum do, lego*) the Quiritary ownership of the thing given; (*b*) *per damnationem*, when the testator bound the heir (*heres meus damnas esto dare*) to give a thing to the legatee, who could compel him by a personal action to give it; (*c*) *sinendi modo*, when the testator ordered the heir to allow the legatee to take the thing given, the legatee having a personal action to make the heir give the opportunity of taking it; and (*d*) *per præceptionem*, a form strictly applicable to the heir, who was thus allowed to take something as a legacy before receiving his share of the inheritance. The *senatusconsultum Neronianum* provided that every form of legacy should be treated as equal to that *per damnationem*, which was the most favourable to the legatee, as anything could be given by it. Justinian enacted that all legacies should be of the same nature, and might be enforced by every kind of appropriate action. (2, note.)

Justinian assimilated *fideicommissa* to legacies, except that a slave was the *libertus* of the testator or of the *fideicommissarius*, according as he received his liberty by a legacy or a *fideicommissum.* (3.)

(*B*) *Co-legatees.*—The same thing might be left to more than one legatee. It might be left *conjunctim*, or, in other language, *re et verbis*, as, I give my slave to A and B; or *disjunctim*, or, in other language, *re*, as, I give my slave to A, I give the same slave to B; or *verbis*, when the co-legacy was only nominal, as, I give my slave to A and B in equal shares. Under the old law the effect of co-legacies differed according to the formula employed. Each under *per vindicationem* or *per præcep-*

tionem could demand the whole thing, and then had to divide it, but under *per damnationem* (if the legacy was given *disjunctim*) the heir had to give the thing to one, and also its value to another; under *sinendi modo* (if the legacy was given *disjunctim*) it is doubtful whether the rule of *per damnationem* applied, or whether, having given the thing to one, he was free as to the other. The *lex Papia Poppæa* introduced a new system, disqualifying *cœlibes* from taking at all, and *orbi* from taking more than half, and giving the legacies thus lapsed (*caduca*), and also all other legacies lapsed under the general law (*in causa caduci*), to those mentioned in the testament in the following order, if they were *patres*:— (*a*) co-legatees, (*b*) heirs, (*c*) substituted heirs, and in default to the public treasury (*ærarium*). Ascendants or descendants to the third degree were exempted from the effect of the *lex Papia*, except that they could take *caduca* under it. Caracalla gave all *caduca* to the *fiscus*; Constantine abolished the law of incapacity arising from celibacy; and Justinian did away with the *lex Papia* altogether. Any legacies passing carried with them burdens, and it was optional to accept them. Justinian gave rights of taking by accrual to every co-legatee, excluding those joined *verbis*, who were really not co-legatees, with this difference, that if the co-legacies were given *re*, the accrual was obligatory, but the burdens of the legacy did not pass. If *re et verbis*, the accrual was voluntary, but the burdens did pass. (8, note.)

(*C*) *Time of Vesting*.—The rights of a legatee were vested (*dies cedit*) at the date of the testator's death, or, under the *lex Papia*, at the day of the opening of the testament. The time when the thing was to be demanded (*dies veniens*) was the time of the heir's entering on the inheritance. The legatee took the thing, and his heirs, if he subsequently died, represented him in taking the thing as it was at the time of the *dies cedens*, excepting in the case of a gift of liberty to a slave or a gift of a personal servitude, when the *dies cedens* dated from the entering on the inheritance. (20, note.)

2. *What could be given by way of Legacy*.—The testator might give not only his property, or that of his heir, but a thing belonging to another, provided it was not a thing *extra commercium*, and provided that the legatee, on whom the burden of proof lay, could show that the testator knew that this thing belonged to another. The heir, if he could not purchase the thing, had to give the legatee its value. (4.) So the heir was obliged to redeem, unless the testator expressly said the legatee was to redeem, a thing which the testator gave as a legacy knowing it to be pledged. (5.) If the legatee had, in the lifetime of the testator, already got the thing given him as a legacy, he could claim the value if he had bought it, but not if he had taken it by a *causa lucrativa*, e.g. gift, unless he had taken it through a slave or descendant in his power. If he had received only the value of the thing, not the thing, under one testament by a *causa lucrativa*, he still could claim the thing under the testament of a different person. (6.) Future things might be given by way of legacy. (7.) A legate might

claim land given him by legacy, although the usufruct had already come to him *ex causa lucrativa*, for the usufruct was treated as a servitude only. (9.) A thing belonging to the legatee when the testament was made could not be given to him as a legacy, even if he had afterwards parted with it; such a case fell under what was termed the *regula Catoniana*, the rule that a legacy invalid when the testament was made remained always invalid. (10.) If the testator gave what he thought belonged to another, although it really belonged to himself, the gift was valid, and so it was if he gave what he thought belonged, but did not really belong, to the legatee. (11.) The legatee was entitled to a thing alienated by the testator, and to have redeemed a thing pledged by the testator, after the testament was made, provided that the thing had not been alienated or pledged with the intention of revoking the legacy. (12.)

A legacy to a debtor of what was due to the testator was valid, and the heir could not recover from the legatee, and might be made to release him, and the debtor might also, by a legacy, have the time of payment deferred. (13.) But a legacy to a creditor of what the testator owed him was invalid, as it gave the creditor nothing unless the testator gave absolutely, or at once, what was previously due conditionally, or after a time. (14.) A husband might give to his wife her *dos* as a legacy, for the legacy gave her a more speedy way of recovering the *dos;* if he gave her her *dos*, and he had not received it, the legacy was void; but if he gave her, by legacy, a definite sum or thing, describing it wrongly as having been brought by her as part of the *dos*, or as mentioned in the *instrumentum dotis*, this description was taken as surplusage, and she could take the legacy. (15.)

Things incorporeal as well as corporeal might be given by way of legacy. Thus the testator might give a debt due to him, unless he had exacted payment in his lifetime, and the heir would have to sue for the benefit of the legatee; or he might order the heir to rebuild a house for the legatee, or release him from debt. (21.) If he gave a slave or anything else generally (*legatum generis*), the legatee had the choice among the things of this description belonging to the testator. (23.) Under Justinian, this right of choice, which had previously been personal to the legatee, went to his heirs, if the legatee died after his rights had accrued; and if there were more than one legatee to whom the right of choice belonged, they must decide by lot which was to make the choice if they could not otherwise agree. (23.) Unless a distinct legacy of choice was given (*legatum optionis*), the legatee could not choose the best of the kind. (22, note.) A legatee might have a share of the inheritance given him (*legatarius partiarius*), and not a specific thing, but still he remained in the position of a legatee as towards the heir. (23, note.)

3. *To whom might Legacies be given?*—To those with whom the testator had *testamenti factio*. (24.) There were excluded (*a*) before Justinian: *deportati, peregrini, Latini Juniani*, unless they became citizens within a fixed time, women under the *lex Voconia*, the unmarried

or childless (to the extent above mentioned, p. 546) under the *lex Papia;* (*b*) in the time of Justinian: heretics, apostates, the children of persons convicted of treason, and the children of, and the parties to, prohibited marriages. A legacy under the old law could not be given to an uncertain person, as e.g. to the man who might marry the testator's daughter, unless it was to an uncertain member of a certain class, as that one of the testator's *cognati* who might marry the testator's daughter; nor, as being an uncertain person, to a posthumous stranger. Justinian made all the legacies to uncertain persons valid (25), and permitted a posthumous stranger to be instituted heir (26); and even previously to Justinian a legacy paid to an uncertain person was not to be refunded. (25.) A legacy to the slave of an heir, unless given conditionally, was invalid; but not so a legacy to the master of a slave instituted heir, for he might not be the master at the time when the slave entered on the inheritance. (32, 33.)

4. *Rules as to the Position, Terms, and Construction of Legacies.*—A mistake in the name of the person benefited, or in the institution of an heir, does not invalidate a legacy, provided it is certain who is meant; nor is a legacy rendered invalid by either a *falsa demonstratio*, as if the testator gives 'Stichus my born slave' (Stichus passes though he is not the born slave of the testator), or by a *falsa causa* or reason assigned wrongly, as 'I give to Titius, because he took care of my affairs'. The legacy is valid whether or not, in fact, Titius did take such care; but if the legacy was conditional, as 'I give to Titius if he has taken care,' then, of course, the condition must have been fulfilled for the legacy to be valid. (29, 30, 31.)

Justinian made it immaterial where in the testament a legacy was placed. Previously, if it was placed before the institution of the heir, it was invalid (34), and he made legacies valid which were to take effect after the death of the heir or legatee; whereas such gifts, except as *fideicommissa*, had previously been invalid, as even had legacies given to take effect the day before the death of the heir or legatee. (35.) Justinian also made valid gifts by way of legacy, or institution of heirs (and revocation and transfers of such legacies) made *pœnæ nomine*, that is, when something given to one of the persons benefited was to be given to another if the person originally benefited did or did not do something, such dealings with heirships or legacies having been previously considered invalid, even though the penalty was given to the emperor or a soldier, as intended to punish one man rather than to benefit another. (36.)

5. *Loss, Diminution, or Increase of Things given by way of Legacies.*—The loss of a thing given as a legacy falls on the legatee, unless the loss has been caused, however innocently, by the heir, on whom the loss then falls. (16.) If a female slave is given with her offspring, the legatee takes the offspring though the mother may be dead, and so he takes the vicarial slaves under a legacy of ordinary and vicarial slaves, though the ordinary slaves may have all died. But under a legacy of

a slave with his *peculium*, or of land with its instruments of use or ornament, the legatee, if he cannot take the slave or the land, cannot take the *peculium* or the instruments. (17.) Under a legacy of a flock of sheep the flock will pass, though reduced to one sheep or increased by young. Under a legacy of a house, marble or pillars subsequently added by the testator will pass. (18, 19.) But as to the gift of a *peculium*, there is this distinction to be made:—If the gift was to a stranger, the amount of the *peculium* that passed was the amount at the death of the testator, with any increase arising out of the things contained in the *peculium;* but if the gift was to the slave himself, the slave had no right until the heir entered and was able to free him; and so for him the amount of the *peculium* was the amount when the heir entered. A gift by legacy to a slave of his *peculium* must be express, although if a man in his lifetime freed a slave the slave kept his *peculium*, unless the emancipator demanded it. (20.)

6. *Ademption and Transfer of Legacies.*—Legacies may be revoked by using directly contrary words, 'Whereas I gave I do not give,' or by any other words, or even by the naked wish of the testator becoming in any way declared, the legatee being then repelled by an exception of *dolus malus* if he sued for the legacy, or by some cause having arisen, e.g. an enmity having sprung up between him and the testator, which made it clear the testator could not, at the time of his death, have wished to benefit him. (Tit. 21. pr., note.) A legacy may also be transferred, as by saying what I gave to A I give to B, and then B would take even if A had died, and A would not take if B had died. (1.)

Lex Falcidia.—The wide testamentary power given by the Twelve Tables (*uti legassit suæ rei, ita jus esto*) and practically used, so that, the inheritance being exhausted by legacies, there was no inducement to the heir to enter, was restrained (*a*) by the *lex Furia*, forbidding more than 1000 *asses* to be given as a legacy, but ineffectually, because any number of legacies to that amount might be given; (*b*) by the *lex Voconia*, providing that no legatee was to have more than each heir had, but also ineffectually, as the number of legatees was not limited; and, lastly (*c*), by the *lex Falcidia*, by which a testator was restrained from giving away in legacies more than three-fourths of the inheritance. A fourth, the *quarta Falcidia*, must always remain to the heirs. (Tit. 22. pr., note.)

If the testator gave distinct shares in his inheritance to different heirs, each heir had a right to one-fourth of his share, even though the total thus deducted on the different shares exceeded one-fourth of the whole inheritance. (1.)

In the application of the *lex Falcidia* regard was had to the value of the estate at the time of the testator's death. A subsequent increase did not augment, nor did a subsequent decrease diminish, the amount the legatees received. But if the estate subsequently fell in value, so that the heir would get nothing by entering, the legatees would have to come to terms with him, to induce him to enter. (2.)

In order to apply the *lex Falcidia*, the testator's debts, his funeral expenses, and the price of the manumission of slaves were first deducted, and then the heir took a fourth of what remained, each legatee having a proportionate amount deducted from his legacy if the testator had given more than three-fourths in legacies. If he had given more than the value of the whole inheritance, no account was taken of the excess, and the heir received a fourth of the actual value. (3.)

The *lex Falcidia* did not apply to military testaments. (3, note.) The Novels introduced a new system. The heir could not claim a fourth unless he first had an inventory made, and he could not retain it at all if the testator forbad its retention, the legatees and other persons interested being then permitted to take under the testament, although the heir refused to enter. (3, note.)

III. FIDEICOMMISSARII.—*Fideicommissa*, or requests to the heir to do something in favour of some one else, and any words of request sufficed (Tit. 24, 3), were expressions of the last wishes of the person who made them, and were dispositions of the inheritance, or of parts of it, the position of the person profiting by them being in the former case analogous to that of an heir, in the latter to that of a legatee.

Either testamentary heirs or heirs *ab intestato* might have *fideicommissa* imposed on them, and *fideicommissa* could be made by testament or by codicils, or orally. (Tit. 23. 1, note.)

The person making the *fideicommissum* was termed the *fideicommittens*, the person requested to perform it *fiduciarius*, and the person to be benefited by it *fideicommissarius*. (2, note.)

The object of *fideicommissa*, when originally introduced, was to benefit persons legally incapable of taking as heirs or legatees. Augustus first gave them legal validity, by desiring the consuls to interfere to see them carried out. By degrees a permanent jurisdiction was established to maintain them, under a special magistrate, the *prætor fideicommissarius*. The proceeding was always *extra ordinem*. No action lay to enforce *fideicommissa*, but the magistrate interposed if he thought it equitable to enforce them. (Tit. 23. pr. and note.)

When first introduced, *fideicommissa* gave the maker of them a very wide range. He could by them give to *peregrini*, to a posthumous stranger, to an uncertain person, to *Latini Juniani*, and the whole inheritance to a woman prevented by the *lex Voconia* from being instituted as heir; and the *leges caducariæ* did not apply. But subsequently this latitude was restricted: *fideicommissa* in favour of *peregrini*, posthumous strangers, and uncertain persons were declared invalid, and the rules of the *lex Papia Poppœa* were made to apply to them. A tutor could not at any time be given by a *fideicommissum*. (Tit. 23. pr., note.)

If a *fideicommissum* was made by testament, the testament must duly institute an heir, or there would be no one to carry out the *fideicommissum*. Originally the heir sold the inheritance to the *fideicommissarius*, the former binding the latter, by stipulation, to indemnify

him against all claims in regard to the inheritance, and the latter binding the former to hand everything over (*emptæ et venditæ hereditatis stipulationes*). (3, note.)

The Senatusconsultum Trebellianum protected the heir, by enacting that, directly the heir gave up the inheritance, all the actions for and against the inheritance should at once pass to the *fideicommissarius* in the shape of *actiones utiles* and the heir be allowed to protect himself against all actions by an exception *restitutæ hereditatis.* (4.)

Senatusconsultum Pegasianum.—But, though the heir was thus protected, there was no inducement to him to enter on the inheritance. Accordingly the *senatusconsultum Pegasianum* was passed, which permitted the heir to retain a fourth of the inheritance against *fideicommissarii* as against legatees. The *fideicommissarius*, who had been placed by the *senatusconsultum Trebellianum* in the position of an heir, was now placed in the position of a legatee, or, to speak more strictly, of a *legatarius partiarius*, that is, of a legatee who had a legacy, not of a thing, but of a share in the inheritance. When legacies of a share were given, actions belonging to the inheritance were brought by, and against, the heir, but the heir stipulated that the legatee should contribute to all outgoings in proportion to his share, and bound himself to pay what was due to the legatee for his share. Similar stipulations were, subsequently to the *senatusconsultum Pegasianum*, made between the heir and the *fideicommissarius* (*stipulationes partis et pro parte*). (5.)

The *senatusconsultum Trebellianum* was, however, still in force, for it operated (*a*) if the *fideicommissa* did not exceed three-fourths of the inheritance, and (*b*) if the heir refused to enter in spite of being sure of his fourth under the *senatusconsultum Pegasianum*, the prætor made him enter, and then all the actions were transferred to, or against, the *fideicommissarius*, and he was in the position in which he would have been if the heir had entered under the *senatusconsultum Trebellianum*. (6.)

Justinian united the two *senatusconsulta*, retaining the name of the *senatusconsultum Trebellianum*. The heir was to retain his fourth, as under the *senatusconsultum Pegasianum;* but actions were to be brought by or against the heir, or the *fideicommissarius*, according to their shares, as under the *senatusconsultum Trebellianum*, so that the *fideicommissarius* was, as to his share, *in loco heredis*. If the heir would not enter, he was compelled to do so, being protected against all loss, as under the *senatusconsultum Pegasianum*. The heir could, under Justinian, but could not previously, redemand the fourth if he had paid it over. (7.)

If the heir had a specific thing given him to retain, equal in value to, or greater in value than, a fourth of the inheritance, he retained it as if he had had a specific legacy of the thing, and all actions as to the whole inheritance passed to, or against, the *fideicommissarius*. If the specific thing to be retained by the heir was less in value than a fourth, then the heir retained also enough to make up the fourth,

and the actions for and against passed to the heir, as to the share retained to make up the difference. (9.)

A *fideicommissarius* might himself be turned into a *fiduciarius*, and be requested to give up to another all, or a part, of what he received; and he was not allowed, like the heir, to retain a fourth. (11.)

Fideicommissa might also be imposed by a person about to die on his *heredes ab intestato* (10), either by a written or oral declaration. If, under Justinian, such an oral declaration was made of his wishes to the heir, before five witnesses, the proof was sufficient. But if it was alleged to have been made before less than five witnesses, or before none at all, the *fideicommissarius*, having previously sworn to his own good faith, might call on the heir to deny, on his oath, that the *fideicommissum* had been made as alleged. (12.)

Fideicommissa of particular things.—An heir or a legatee might be charged by a *fideicommissum* to give up a particular thing specified by the testator (Tit. 24. pr.), and even a particular thing belonging to another person, the *fiduciarius* being thus obliged, if he could, to buy it for the *fideicommissarius*, or, if he could not buy it, to give its value to the *fideicommissarius*. (1.) Freedom, too, might be given to the slave of another person by a *fideicommissum*, and, if the *fiduciarius* could not at once purchase the freedom of the slave, he must wait to see if any opportunity of doing so might arise. The slave so enfranchised was the freedman of the *fideicommissarius*, whereas slaves who received their freedom directly by testament (and only those who were slaves of the testator, both at the time of his making the testament and at the time of his death, could so receive their freedom) were the freedmen of the dead man, and hence were called *orcini*. (2.)

Codicils.—*Codicilli*, or small tablets containing memoranda addressed to the heir, were held to create binding *fideicommissa* in the time of Augustus, on the authority of Trebatius and Labeo. (Tit. 25. pr.) If there was no testament, they were binding on the *heres ab intestato*. (2.) If there was a testament, then being considered as attached to the testament, they failed if it failed, but a testator could, by inserting in his testament an express clause to that effect (*clausula codicillaris*), provide that his testament should, if invalid as a testament, be valid as a codicil. (Tit. 25. pr., note.) If the codicils were made before the testament, and not confirmed by it, they were binding, unless a contrary intention appeared in the testament. If made after the testament and not confirmed by anticipation in it, they were binding as creating *fideicommissa;* but by codicils made before or after the testament, and confirmed by it, not only *fideicommissa* could be created, but legacies given or a tutor appointed. (1, note.)

No form was necessary for codicils. The joint effect of enactments of Theodosius and Justinian was that they were to be made in the presence of five witnesses, who were to subscribe them. If they were not so made, the *fideicommissarius* might, having sworn to his own good faith, call on the heir to deny them on oath. (3, note.)

BOOK III.

INTESTATE SUCCESSION.

WE now come to the second mode of acquiring *universitates rerum*, that is, intestate succession. In this there were three ranks:—1, *sui heredes;* 2, *agnati;* 3, in substitution for the *gentiles* of the old law, *cognati.*

I. SUI HEREDES.—When a person died intestate, which might happen in five ways,—by (*a*) his having made no testament, (*b*) his testament not being legally valid, (*c*) its being revoked, or (*d*) made useless by change of *status*, or (*e*) no heir entering under it,—the inheritance passed, by the law of the Twelve Tables, in the first place, to the *sui heredes* (Tit. 1. pr., 1), i.e. the children, natural, adoptive, or made legitimate, in the power of the deceased at the time of his death (2), or, to speak more accurately, at the time when it is established that he died intestate (7); a grandson, however, the son of a deceased son, both conceived and born after the grandfather's death, but before the fact of intestacy becoming established, not ranking as a *suus heres*, as not having been connected with the deceased while alive by any tie of relationship. (8.) A child, however, might become a *suus heres*, though not in the power of the deceased at the time of his death, if he was a captive, and, returning subsequently to his father's death, was made a *suus heres* by postliminy. (4.) And, on the other hand, a child, though in the power of the deceased at the time of death, might not be a *suus heres;* for the deceased might be adjudged, even after his death, to have been guilty of *perduellio* (treason), and then, as the *fiscus* took his estate, there could be no *suus heres.* (5.) *Sui heredes* were, under the old law, obliged to take the inheritance (*necessarii*), and, as they could take it without their knowledge or assent, the sanction of a tutor of a pupil, or of the curator of an insane person, was not required, but the prætor gave *sui heredes* the *beneficium abstinendi*, and enforced against them as against all *heredes ab intestato*, when necessary for the protection of creditors, the *beneficium separationis.* All children, of both sexes, took equally; more remote descendants *per stirpes.* (6.)

The prætor, by giving the *possessio bonorum unde liberi*, placed in the rank of *sui heredes* (*a*) emancipated children (9); (*b*) if the emancipated father was dead, grandchildren conceived after his emancipation (9, note); (*c*) if the *de cujus* was an emancipated son, his unemancipated children conceived before the emancipation; emancipated children bringing into the inheritance their property, and married daughters

their dowry (9, note); (*d*) *sui heredes restituti in integrum* after a *capitis deminutio.* (9, note.) The prætor also preserved in their rank of *sui heredes* those who were improperly disinherited. (12.) Those raised to the rank of *sui heredes* had the option of taking or refusing the inheritance within a given time. (Tit. 1. pr., note.)

Children given in adoption, or emancipated, and then giving themselves in arrogation, were, if emancipated by the adoptive father in the lifetime of the natural father, allowed by the prætor to rank among his *sui heredes*, but had no claim on the inheritance of the adoptive father. If emancipated by the adoptive father after the death of the natural father, they had no claim on the inheritance of the adoptive father, and only that of *cognati* on that of the natural father. (10, 11, 13.) Under Justinian the adopted son always, unless adopted by an ascendant, remained in the family of the natural father, and succeeded as a *suus heres* to his adoptive father, if intestate, but had no claim to be benefited by his adoptive father's testament. (14.)

A constitution of Theodosius permitted the children and descendants of deceased daughters to succeed to the portion their mothers would have received as *sui heredes*, giving up one-third of it to other *sui heredes*, if there were any, and, if not, one-fourth to the *agnati.* (15.)

Under Justinian these persons succeeded to the whole share of the deceased daughter, without any deduction. (16.)

II. Agnati.—When there was no *suus heres* or any one called to rank with *sui heredes*, or none who entered on the inheritance, then the inheritance passed by the law of the Twelve Tables to the nearest *agnati*, i.e. those related to the *de cujus* through males by birth or adoption (Tit. 2. pr., 1, 2); by nearest being meant nearest at the time when the fact of intestacy was established. (6.) If the nearest *agnatus* did not enter, or if there were more than one in the same degree, then if none of the nearest *agnati* (5) entered, the inheritance passed, not to more remote *agnati*, but at once to the *cognati* or blood relations, among whom the more remote *agnati* were included by the prætors. (7.) For there was no devolution among *agnati*, just as there was none among those called to rank with *sui heredes.* Justinian altered this, and permitted devolution among *agnati.* (7.)

There are four special points to be noticed in the history of the changes made in the law of agnatic succession.

1. *The Position of Females.*—The law of the Twelve Tables placed males and females descended through males on an equality. The *media jurisprudentia*, i.e. the opinions of the jurisprudents, excluded altogether females descended through males except sisters so descended (*consanguineæ*). The prætors allowed those excluded to come in as *cognatæ.* Justinian restored them to the place they held as *agnatæ* under the law of the Twelve Tables. (3.)

2. *The Position of Emancipated and Uterine Brothers and Sisters and their Children.*—Under the old law such persons had nothing to

do with the agnatic succession. They were introduced into it under the later empire. Anastasius gave the rights of agnation to emancipated brothers and sisters, one-fourth of what they would have received if they had remained in the family being deducted. Their children remained *cognati.* Justinian gave the rights of agnation to uterine brothers and sisters and their children; and subsequently admitted as *agnati* emancipated brothers and sisters, without deduction of a fourth, and their children. (4, note.)

3. *The Position of the Ascendants.*—The ascendant had under the old law no place in the agnatic succession, as he would take by virtue of his *patria potestas*, unless the deceased descendant had been emancipated. If emancipation had taken place with an understanding that the nominal emancipator should take everything he got as patron in trust for the emancipating ascendant (and, under Justinian, every emancipation was taken to be made on these terms), then this ascendant took as patron in default of *sui heredes*, but Justinian placed the brothers and sisters of the *de cujus* before him. (8, note.)

Under the later empire the goods coming from his mother to the *de cujus* passed (*a*) to his children and other descendants, (*b*) then to his brothers and sisters, and (*c*) to his father in preference to his grandfather. This too, under Justinian, was the order of succession to the *peculium* of a deceased son, except that here the rights given by the *patria potestas* were so far preserved that the father took after, not before, the grandfather. (8, note.)

4. *The reciprocal Succession of Mothers and Children.*— The mother was allowed to succeed to her children by the *senatusconsultum Tertullianum*, and children to their mother by the *senatusconsultum Orphitianum.* (A summary of the changes in the law under this head is given under Tit. iv. 4.)

III. Cognati.—After the *sui heredes* and the *agnati* came, in the old law, the *gentiles*, or members of the same *gens.* But the succession of the *gentiles* became obsolete, and the prætor substituted the *cognati*, that is, persons bound together by blood relationship. (Tit. 5.) The *cognati* included those who had undergone a *minima capitis deminutio* (1), i.e. emancipated children, and children in an adoptive family (3), collaterals by the female line (2), and children born of the same mother, but of an uncertain father. (4.) Later legislation, as has been shown in the first four Titles of the Book, took many persons out of the rank (*ordo*) of *cognati*, and made them rank with *sui heredes* or *agnati*. (1.) There was no limit to the remoteness in which agnation was recognised, but the prætor only gave the *possessio bonorum unde cognati* to blood relations within the sixth degree, or, in the one case of children of a second cousin, to those in the seventh degree. (5.) The degrees of relationship of ascendants and descendants are calculated by the stages of ascent or descent. There is a stage to the father or the child, a second to the grandfather or the grandson. The degrees of collateral relationship are calculated by going up to and

down from a common ancestor, and adding up the total number of stages. (Tit. 6. pr.) Justinian, altering the old law, so far recognised ties of cognation among slaves, that in the case of the parents and the children being enfranchised, they had reciprocal rights of succession, and the children were in the position of children born in a regular marriage. (10.) It is scarcely necessary to add that among persons of the same natural degree (*gradus*) of relationship, those are preferred who belong to a higher rank (*ordo*), i.e. who are, or rank with, *sui heredes* or *agnati*. (11, 12.)

Before quitting the subject of intestate succession, we have to notice two subsidiary points connected with it: (1) the succession (modified by the assignation) of freedmen, and (2) the machinery by which the prætor modified intestate succession, *bonorum possessio*.

1. (A.) SUCCESSION OF FREEDMEN.—Under the law of the Twelve Tables the *sui heredes* of the freedman, including adopted children and a wife passing *in manum*, excluded the patron, who, and whose children, succeeded only if there were no *sui heredes*, and the freedman might make what testament he pleased and exclude the patron. A freedwoman, however, being in the patron's *tutela*, could only make a testament with her patron's consent, and as she could have no *sui heredes* he necessarily succeeded to her if she died intestate. (Tit. 7. pr.) Under the prætorian system, the prætor thinking it hard that the patron should be excluded by adoptive *sui heredes*, or a wife married *in manum*, gave the patron possession of half the goods, whether the freedman died testate or intestate; the patron being still excluded altogether by natural children, although they had passed out of the freedman's family, unless they were properly disinherited. This change, however, did not apply in favour of a *patrona* or the daughter of a *patronus*; but by the *lex Papia Poppœa*, women having the *jus liberorum* were placed on a level with men in this respect. (1.) The *lex Papia Poppœa* also introduced a change in favour of patrons. If a freedman left a fortune of 100,000 sesterces, and fewer than three children, the patron took a virile part (i.e. half if there was one child, and a third if there were two) of the inheritance, whether the freedman died testate or intestate. (2.) Justinian did away with all distinction between the *patrona* and the *patronus*, and between the *liberta* and the *libertus*, and regulated the succession of freed persons as follows:—First came the children of the freedman (to speak only of a man), whether in his power or not, or even if born before he was enfranchised. Then, if he had no children, came the patron and his descendants; in default of these the collaterals of the patron to the fifth degree. If the freedman had children, he could make any testament he pleased; if he had not, he could only make what testament he pleased if his fortune was less than 100 *aurei*; if it was more, he must leave one-third to the patron. (3.) By a change, subsequent to the date of the Institutes, Justinian, in case the freedman left no children, preferred the father and mother, and the brothers and sisters,

of the deceased to the patron. While, before Justinian, there were still *Latini Juniani*, their goods were treated as a *peculium*, which passed in all cases on their death to the manumittor, who could deal with it by testament as he pleased; but by the *senatusconsultum Largianum* the children of the patron, unless duly disinherited, were preferred to *extranei heredes;* and by an edict of Trajan, if a slave, against the will or without the knowledge of the patron, was made a Roman citizen by imperial rescript, he was considered, indeed, during his life a Roman citizen, but at the moment of death became a *Latinus*, and the rights of the patron were restored. (4.)

(B.) Assignation of Freedmen.—A patron having two or more children in his power (Tit. 8. 2) might instead of allowing the goods of a freedman to go equally to all the patron's children in the same degree as they otherwise would do (Tit. 8. pr.), assign, by or without a testament, and in any terms (3), to any person in his power (2), a freed man or woman, so that after the death of the parent the person to whom the freed person is assigned is alone considered the patron, and excludes all other children. (Tit. 8. pr.) But if the assignee died or was emancipated (2), the force of the assignment was at an end.

II. Bonorum Possessiones.—The prætor placed the person best entitled in possession of the *hereditas*, in case the possession was disputed, and then in process of time regulated this admission as he thought best to amend, to correct, or to supplement, the civil law (Tit. 9. 1); and usucapion ripened into ownership the possession he gave. The possessor was ordinarily protected by the interdict *quorum bonorum;* and to obtain this protection, the heir who had under the civil law an indisputable title often demanded the *bonorum possessio;* the prætor generally acting under his executive authority and giving possession according to his edict (*possessio edictalis*), and sometimes giving a special possession (*possessio decretalis*) after hearing the parties, and then sometimes only giving an interdict forbidding violent eviction. (1, note.)

The various kinds of possession of goods are divided according as there was, or was not a testament; out of ten kinds known before Justinian, two referred to testate, and eight to intestate succession.

To testate succession belonged (*a*) *possessio contra tabulas*, given to children passed over; (*b*) *possessio secundum tabulas*, given (but only after it had been ascertained that the *possessio contra tabulas* was not due) when the heir, under a duly made and valid will, wished for protection of the interdict *quorum bonorum*, when the prætor wished to uphold a testament defectively made, or in other cases, as that of the institution of a posthumous stranger, or of an heir under an unfulfilled condition.

To intestate succession belonged eight, four relating to the succession of freemen, four to that of freedmen. A summary is given of these eight kinds of possession under Tit. 9. 3. If there was no one to whom possession could be given, the *ærarium*, or, later, the *fiscus* took the goods. (3.)

Out of the ten kinds of possession just mentioned, Justinian suppressed four of those relating to intestate succession, viz. the *unde decem personæ*, suppressed because under his system parents were themselves the manumittors of their children (4); the *tum quem ex familia*, the *unde liberi patroni patronæque et parentes eorum* (5), and the *unde cognati manumissoris* (6), rendered obsolete by his system, and regulating the rights of patronage. He, however, retained a kind of possession, known to the previous law, though not reckoned in the ten ordinary kinds; that, namely, *tum quibus ex legibus*, when possession was given in pursuance of a direct enactment, as, e.g., when the patron shared with the children of the *libertus* under the *lex Papia Poppæa*. (7.)

Possession of goods had to be demanded by parents and children within a year, and by all others within a hundred days of the time of their knowing of their rights (8), *dies utiles* alone being counted. (9.) If not demanded, then the rights of possession of the person not demanding at the time fixed, or refusing it, passed to those in the same degree, and if there were none, then to those in the next degree. (9.) Demand was made before a magistrate, and special terms of demand, *da mihi hanc possessionem*, were necessary, until Constantius permitted any terms to be used, and Justinian did away with the necessity of an application to a magistrate. If a person having, as civil heir, right to demand possession, did not demand it, accepting the inheritance under his civil right, and the next in the order of prætorian succession did, after the delay had expired, demand possession, it was given him, but only *sine re* as opposed to *cum re:* he got the technical *possessio*, but not an interest in the goods conclusive against the heir. (10.)

System of the Novels.—In the years 543 and 547, by the 118th and 127th Novels, Justinian introduced a totally new scheme of intestate succession, a summary of which is given under Tit. 9. 10.

Other Modes of acquiring a Universitas Rerum.

We now pass to the four remaining modes by which a *universitas rerum* was acquired, in addition to testamentary and intestate succession.

i. Arrogation.—The first is arrogation, which is specially mentioned as forming part of the customary law. (Tit. 10. pr.) By arrogation all the property and all the debts due to the arrogated passed to the arrogator, except only those things which were extinguished by the *capitis deminutio* which arrogation involved, such as the rights of agnation, and the services which a freedman bound himself by oath, as the price of his freedom, to pay to the patron, and which, being personal to the patron, were extinguished if the patron was arrogated. (1.) The arrogator was not bound to pay the debts of the arrogated, just as a *paterfamilias* was not bound to pay the debts of the son; but the property of the arrogated was made answerable, the prætor, by a sort of *restitutio in integrum*, allowing the creditors to proceed against the arrogated as if

the arrogation had not taken place, and unless the arrogator satisfied them the prætor gave them possession of the goods, and allowed them to be sold. (3.) Under Justinian's legislation, if any property was acquired by the arrogated from any source except the arrogator, the usufruct only went to the arrogator, and if the arrogator died, the property in it passed to the children, and, if none, to the brothers and sisters of the deceased, and only in default of them to the arrogator. (2.) What is said of arrogation as a mode of acquiring a *universitas rerum* is true of the *conventio in manum* of a wife under the old law. (1, note.)

ii. Bonorum Addictio.—The mode next noticed of acquiring a *universitas rerum* is the *bonorum addictio*, introduced by a constitution of Marcus Aurelius. (Tit. 11. pr.) If a testator (even by codicils) gave liberty to any slaves, then, after the inheritance had been successively (4) rejected by the *heredes ex testamento*, the *heredes ab intestato*, and the *fiscus*, any of these slaves, or, under a constitution of Gordian, any one else (1, note), might apply to have the goods given over to him (*bonorum addictio*), on his undertaking to satisfy the creditors in full, the application being entertained both in favour of liberty, and to spare the deceased the disgrace of a sale of his goods. (2.) The slaves enfranchised by the testament were, when manumitted, the freedmen of the deceased (*orcini*), unless there was only a fiduciary direction to manumit them, or the slaves had agreed to be the freedmen of the person to whom the *addictio* was made. The constitution further directed that even when, in such a case, the *fiscus* accepted, the directions as to liberty should be carried out. (1.) If a person while under twenty-five years did not accept as *heres ab intestato* an inheritance, and liberty was acquired by the *addictio bonorum*, then, although when he was twenty-five he might be *restitutus in integrum* and accept, yet the liberty once given could not be taken away. (5.) Justinian extended the *addictio* to cases where freedom was given not by testament but *inter vivos* or *mortis causa* (6), and also provided that the *addictio* might be made after a sale by the creditors had taken place, if the application was made within a year from the sale, which was then rescinded; and that a composition accepted by the creditors, or only enfranchisement of some of the slaves directed to be enfranchised, should be accepted, if necessary, as satisfactory; and that if those entitled to apply for an *addictio* did not all apply at the same time, the first applicant should have the possession. (7, note.)

iii. Bonorum Venditio.—The mode next noticed of acquiring a *universitas rerum* is the *bonorum venditio*, one of the prætorian modes of execution by which a transfer of the entire property of a debtor was made to the person who, in consideration of receiving it, would pay the largest proportion of the creditor's claims. A summary of the mode in which, and the circumstances under which, this process was carried out, is given under Tit. 12. pr. In the time of Justinian this process had become obsolete, and the goods of the debtor, being handed

over to the creditors, were sold by them separately as occasion might offer (*bonorum distractio*).

iv. FORFEITURE UNDER THE SENATUSCONSULTUM CLAUDIANUM.—A *universitas rerum* was acquired under the *senatusconsultum Claudianum*, when a free woman was denounced three times by the master of a slave as having formed a disgraceful connection with the slave. A magisterial decree reduced her to the condition of an *ancilla*, and she and her property passed to the owner of the slave. If it was a freedwoman who formed such a connection, she became again the slave of her patron, unless he had assented to her conduct, in which case she became the slave of the owner of the slave with whom she had disgraced herself. Justinian abolished all this as unworthy of his empire. (Tit. 12. 1.)

OBLIGATIONS.

We now pass to obligations. A summary is given in the text, under Tit. 13. 2, of the meaning of the term obligation, and of the main features of Roman law with regard to the sources of obligations, contracts, *culpa*, interest, and the actions attached to obligations.

Of the ten recognised heads of contracts, the first noticed are those made *re*.

CONTRACTS RE.—There were four kinds of contracts made *re*, i.e. by the delivery of the thing: *mutuum*, *commodatum*, *depositum*, *pignus*. In *mutuum* the receiver became the owner, in *pignus* he became the possessor, in *commodatum* and *depositum* he became *in possessione* of the thing delivered. (Tit. 14. pr.)

Mutuum.—Here the deliverer of the thing makes over the thing as the property of the recipient, who by receiving it binds himself to return an exact equivalent *in genere*, and who, if he fails to do this, can be sued by a *condictio certi* (1), although the thing handed over to him may have perished through mere accident. (2.)

Commodatum.—Here the deliverer gratuitously puts the recipient in possession of a thing which the recipient wishes to make use of. As it is the recipient who benefits by the contract, he has to take the care of it which a *bonus paterfamilias* exercises, and not merely the care he takes of his own property; but he is not answerable if the thing is lost through causes wholly beyond his control. He can, when the term for which the thing was lent has expired, be made to restore this identical thing or its value by the *actio commodati directa*, having in turn an *actio commodati contraria* (both actions being *bonæ fidei*) for any extraordinary expenses or for losses through the fault of the deliverer. (2.)

Depositum.—Here the deliverer for his own benefit puts the recipient (who receives gratuitously) in possession of a thing which the deliverer wishes to have kept for him. The recipient, as he is conferring a benefit, is answerable not for carelessness, but only for negligence so great as to amount to fraud. When, however, the deposit

was made in circumstances of sudden calamity, as fire or shipwreck, the recipient had to pay double the value of the thing if he denied that he had received it. The identical thing can be reclaimed at any time by the deliverer, and must not be made use of by the recipient. The deliverer had the *actio depositi directa* for the restitution of the thing, and the recipient the *actio depositi contraria* (both actions being *bonæ fidei*) for all expenses incurred and losses sustained through the fault of the deliverer. (3.)

Pignus.—Here the deliverer, the debtor, puts the recipient, the creditor, in possession of the thing; but the creditor cannot make use of it, and although he may apply the fruits in reduction of principal, he cannot take them except by special agreement for interest. The creditor was bound to use the diligence of a *bonus paterfamilias*, but he was not liable for loss by accident. The creditor was compelled by the *actio pigneraticia directa* to restore the thing when his claim was settled, and could bring the *actio pigneraticia contraria* (both actions being *bonæ fidei*) to recoup himself for expenses and for losses caused by the debtor. (4.)

Contracts made Verbis.—There were two forms of contract made *verbis*, besides stipulations, known to the old law, but obsolete in the time of Justinian, the *dictio dotis* and the *jurata promissio liberti* (Tit. 15. pr., note); but it is only of stipulations that any notice need be taken.

Stipulations.—Stipulations were a form of unilateral contract, in which the stipulator or questioner asked the promissor whether he would enter into the engagement proposed, and on the promissor replying that he would, the contract was complete. Originally the peculiar words, *spondesne*, *spondeo*, could only be used by Roman citizens, but in later times no special form of words was necessary as long as there was a question and an answer. (1.)

A stipulation may be made simply (*pure*), or may be modified, either with reference to a term (*in diem*), or by being subjected to a condition. (2.)

When a stipulation is made *in diem*, as to give on a future day named, the interest in the stipulation is at once fixed (*cessit dies*); and if the promissor pays before the day named, he cannot get his money back; but the time for enforcing the obligation does not come (*non venit dies*) until the whole of the future day fixed has expired. (2.) If a person promises to give in a distant place, a delay sufficient to make the execution of the promise possible is implied. (5.) Lapse of time was not a means recognised by law for the extinction of an obligation or promise to pay so much to a man every year while he lived: it was therefore theoretically never extinguished, but the heir of the stipulator would be prevented by an exception from enforcing the promise after the stipulator's death. (3.)

When a stipulation is made conditionally, the interest of the stipulator is not fixed till the condition is fulfilled. He has only a hope

that the thing will be owed to him, but this hope (*spes debitum iri*) passes to his heirs, and they can enforce the contract when he could have enforced it. A promise to give if a man does not do something in his power is equivalent to a promise to give when he dies, and, as he must die some day, is made *in diem*. (4.) If the condition relates to past or present time, the knowledge of the parties as to the event is immaterial. Either the condition has not been fulfilled and the stipulation is of no effect, or it has been fulfilled and the stipulation can be enforced at once. (6.) Where the promise is to do something or not to do something, the proper course is to fix in the stipulation the penalty to be paid if the thing is not done or is done, as this avoids uncertainty as to what amount ought to be paid for the breach of promise. (7.)

Co-stipulators. Co-promissors.—A verbal contract might be made so that more than one person should be joined in the stipulation, the promissor undertaking to give to each, or in the promise, each promissor answering affirmatively the question. These contracts might also be made so as to create joint creditors or joint debtors (Tit. 16. pr.), and one promissor might answer so as to bind himself simply; the others in a modified manner. (2.) The thing was due to each co-stipulator and from each co-promissor. If the thing was given by or to any of the joint parties, the obligation was at an end. If one co-promissor ceased, as by *deminutio capitis*, to be bound, the other co-parties remained bound. If, however, an action was brought on the contract, then the obligation was at an end, but, under Justinian, if the co-promissor sued could not pay entirely, the others might be sued for the deficiency. (1, note.) The co-promissor who had paid all could recover their shares from the other joint debtors, either as a partner, if there was a partnership, or if not, by so paying, or by the law allowing him to feign that he had so paid, that the actions of the creditors were made available for his benefit. (1, note.)

Stipulations of Slaves.—A slave can stipulate (though he cannot promise) for his owner (Tit. 17. pr.), whether he names his owner or not (1); and if a slave stipulates after his owner's death and before the entry of the heir, he acquires for the inheritance. (Tit. 17. pr.) He may stipulate, however, for a personal right for himself, as for leave to cross a field, but he exercises this for his master's benefit. (2.) When a slave is held in common, he acquires for his joint owners in proportion to their interests in him, unless he is acting by the orders or in the name of one only of them, or unless the thing cannot be acquired by one of them, as, e.g., if it is already owned by one of his owners. (3.)

Division of Stipulations.—Stipulations may be divided according as they are voluntary or not. (Tit. 18. pr.) Those that are not voluntary are, 1, judicial, required by the judge; 2, prætorian, required by the prætor or ædile; 3, common, required properly by the prætor, but often, for the sake of avoiding delay, by the judge. Instances of those required by the judge are the security required *de dolo*, that a person

condemned to restore a thing shall restore it without fraudulently lessening its value; and *de persequendo servo*, that a defendant will pursue or pay the price of a slave the subject of litigation, who has, through the defendant's fault, escaped out of the defendant's possession. (1.) Instances of those required by the prætor are *damni infecti*, security against apprehended injury, and *legatorum*, security by the heir that he will pay the legacies. (2.) Instances of those required sometimes by the prætor, sometimes by the *judex*, are *rem salvam fore pupillo*, security for the property of a pupil, and *de rato*, that a principal will ratify what the procurator does for him. (4.)

STIPULATIONES INUTILES.—Stipulations are invalid for various reasons, which may be classed under the following heads:—

i. *On account of their object*, as when the stipulation is (*a*) for a thing that does not or cannot exist (Tit. 19. 1); or (*b*) for a thing of which the stipulator has not the *commercium*, as for a *res sacra* or a freeman; and in such cases the stipulation is invalid at once, though the thing may afterwards become such as he is capable of holding, as it also becomes void if the thing, without the fault of the promissor, becomes such as the stipulator cannot hold (2); (*c*) for a thing belonging to the stipulator or in case it may belong to him (2, 22); or (*d*) *ex turpi causa*, as to commit murder. (24.)

ii. *On account of the persons by, for, or between whom they are made.*—1. Stipulations are invalid when made *by* (*a*) dumb or wholly deaf persons (7); (*b*) madmen (8); (*c*) an infant pupil; or (*d*) a *filius-familias* below the age of puberty. (9, 10.)

2. Stipulations are invalid when made *for* (*a*) a third person other than a person in whose power the stipulator is. (4.) But such a stipulation may be made valid by adding that, if payment to the third person is not made, a penalty shall be payable to the stipulator (19); and whenever the stipulator has an interest in the payment to a third person being made, as if it is a co-tutor who on retiring stipulates, to save himself, that the property of the pupil shall be safely administered by the remaining tutors, or if the third person is a procurator or creditor of the stipulator, the stipulation is valid. (20.) If a stipulator engaged for payment to himself or another, payment to the other extinguished the obligation. If he stipulated for payment to himself and another, he could recover half the sum stipulated for. (4.) (*b*) The stipulation was also invalid if the promise was so made to bind a third person as that this third person should give or do something (3, 21); but the stipulation might be made valid either by the promissor promising that he would manage that the third person gave or did the thing, or that he himself would pay a penalty in case the third person did not give or do the thing. (3, 19.)

3. Masters cannot stipulate *with* their slaves, nor fathers with their children in their power. (6.)

iii. *On account of the manner in which they are made.*—The parties must consent to the same thing (5, 23); and if several things are in-

cluded in the question, the promissor is, unless he gives a general assent, only bound as to those things to which he bound himself by his answer. (18.) The question is inferred from the record of the answer in a written document embodying a stipulation. (17.)

iv. *On account of the time or the condition subject to which they are made.* (*a*) *Time.*—A stipulation was invalid that a thing should be given after the death of the stipulator or the possessor, because the right to have the engagement performed would then accrue not to the party to the contract, but to his heirs, who were in the position of third persons. (13.) An engagement to give the day before death was equally invalid, as until the death occurred it could not be known when the day was. (13.) But an engagement to give at the time of death was valid, as the performance was considered to become due before the heir occupied his position as heir (15), and a stipulation to give after the death of a third person was valid as being merely an uncertain term. (16.) A preposterous stipulation, that is, 'If something happens to-morrow, will you give me to-day?' was invalid. (14.) Under Justinian, however, all the causes of invalidity under this head and as to the time of death were removed. (13, 14.)

(*b*) *Condition.*—An impossible condition makes a stipulation void, but a stipulation is valid and the thing is due at once, if it is given in case an impossible condition is not performed. (11.) The heirs of the stipulator and the promissor could sue and be sued if the condition of a properly made conditional stipulation was fulfilled after the death of the party to whom they were heirs. (25.)

FIDEJUSSORES.—The general term for becoming surety was *intercessio*, and the principal modes of *intercessio* were (1) *adpromissio*, (2) *fidejussio*, (3) giving a mandate *credendæ pecuniæ*, or a *pactum constitutæ pecuniæ*, an engagement to pay the ascertained debt of the principal. The Institutes only treat of *fidejussores*. The *correi stipulandi et promittendi*, mentioned in Title 16, were parties to the same verbal contract. But it was also possible for persons to enter into a contract as accessories to the principal contract. If one of these accessories, or the principal, was sued, no further action could, until Justinian's time, be brought by the creditors against those not sued, the debt being extinguished by the *litis contestatio*, and payment to the accessory of the creditor was a good payment as against his principal. (Tit. 20. pr.)

In stipulations there could be added an *adstipulator*, and the principal use of adding one was, before procurators were recognised, to put a person in the position of a procurator, and, after procurators were recognised, to make valid a stipulation for something after the death of the stipulator. The rights of the *adstipulator* did not pass to his heirs.

The *adpromissores* (*sponsores* if Roman citizens, *fidepromissores* if *peregrini*) might bind themselves for as much as, or for less than, their principal bound himself, not for more. Their heirs were not bound, and they had against their principal an *actio mandati*. Several laws

were made for their protection. By the *lex Apuleia* any one of them who had paid the whole debt could recover all beyond his share from the others by an *actio pro socio*. By a law of uncertain name the creditor had to give notice beforehand for what amount he was going to exact security, and how many accessories there were to be. By the *lex Furia* the obligation was only binding for two years, and the amount of the liability of all was divided equally among all living when the guarantee could be enforced. The *lex Publilia* gave a special privilege to *sponsores* (not to *fidepromissores*), allowing them, unless reimbursed in six months, to bring against their principal a special action, *actio depensi*, and, if he denied his liability, to recover double, or to take his person in execution. The *lex Cornelia* provided that no one should bind himself for the same debtor, to the same creditor, in the same year, for more than 20,000 sesterces.

The *lex Cornelia* applied, however, not only to *adpromissores*, but to *fidejussores*, which marks the first introduction of a form of suretyship which, at last, superseded entirely the use of *adpromissores*. The *fidejussor* bound himself by saying in Latin or in Greek (7) that he also ordered the thing on his faith, but no strictness of the formula was here necessary. Like the *adpromissor*, the *fidejussor* could not bind himself for more than his principal (5), and had an *actio mandati*, or, if he had intervened without the principal's authority, an *actio negotiorum gestorum*, against the principal for what he paid for him. (6.)

The advantages of having *fidejussores* over *adpromissores* were: (*a*) They could be used to guarantee any kind of obligation, including obligations arising out of delicts and natural obligations, whereas *adpromissores* could only guarantee verbal contracts. (1.) (*b*) The *fidejussor* bound his heirs, the *adpromissor* did not. (2.) (*c*) There was no limit to the time during which *fidejussores* were bound, whereas *adpromissores* were only bound for two years from the time when the obligation could have been enforced against them. (2, note.) (*d*) The *fidejussio* might be made beforehand to guarantee a principal contract not yet made—*adpromissio* could not. (3.)

The *fidejussores* were each liable for the whole debt, and one who paid had no means of making the others contribute, except by taking advantage of the *beneficium cedendarum actionum*, that is, the surety who was willing to pay in full could repel the creditor by an *exceptio doli mali*, unless the creditor would cede his actions to the surety who paid him; and by means of these actions the surety could force the principal, or his co-sureties, to pay him what he was entitled to receive. Hadrian, however, enacted that, if any *fidejussor* was sued, he should have what was termed the *beneficium divisionis*, i.e. he might force the creditor to divide his demand among all the *fidejussores* who were solvent at the time of the *litis contestatio;* but the *fidejussor* must make this demand formally, since the *beneficium* did not take place *ipso jure*, as the provisions of the *lex Furia* did in favour of *adpromissores*. And it might still be more to the interest of the surety to take advan

tage of the *beneficium cedendarum actionum*, as he thus took over any property pledged to the creditor, and might satisfy his claim in this way. (4.)

Justinian introduced what was termed the *beneficium ordinis*, by which a surety might require that the principal should be sued first, and the sureties only called on to pay what could not be recovered from him. (4, note.)

By the *senatusconsultum Velleianum* women were forbidden to bind themselves for another person. (Tit. 20. pr., note.) A *fidejussor* who signs a writing (*cautio*), by which he binds himself as *fidejussor*, is taken to have gone through all the necessary forms. (8.)

Contracts made Litteris.—A contract was made *litteris* when an entry, *expensilatio*, under the name of the debtor, was made in the ledger (*codex*) of the creditor with the assent of the debtor, to the effect that the creditor had paid, and the debtor received, a certain sum of money. The best evidence of the assent of the debtor was his making a corresponding entry in his ledger, but this was not necessary. As the contract was for a sum certain advanced, it was enforced by a *condictio;* and as the remedy by *condictio* was a short and simple one, other debts, as, e.g., what was owing under a sale, were changed by novation into debts due under a literal contract (*transcriptio a re in personam*), by the debtor owning to having received as a loan the sum due from him on the sale; and, in the same way, the debtor might take, under a literal contract, the debt of a third person (*transcriptio a persona in personam*), by assenting to an entry that he, the debtor, had received a loan to the amount of the sum owed by the third person.

Contracts *litteris* were peculiar to Roman citizens. *Peregrini* had as a substitute *syngraphæ*, signed by both parties, and *chirographa*, signed by the debtor only. These were not merely documentary evidence, but were writings on which an action could be brought; but if there was a stipulation this was always looked on as the contract, and the writing was only evidentiary. If the creditor sued on a contract *litteris*, the defendant might plead the *exceptio non numeratæ pecuniæ*, in case he could state that he never really had received the money, and then the creditor had to prove that he had really paid. Subsequently mere acknowledgments of debt (*cautiones*) were protected by the same exception, and superseded contracts *litteris*. This exception could only be pleaded within a period fixed first at one year, then at five years, and by Justinian at two years; and within the same period, if the debtor could show that he had not had the money, he could ask to have the writing, on which he was sought to be charged, given up to him. After this period had elapsed, the debtor was conclusively bound by any written admission of debt, but, under Justinian, the debtor, by going through certain forms, at any time during the two years, might get his exception made perpetual; and Justinian also made a person falsely denying his written acknowledgment of debt liable to pay double the amount. (Tit. 21, and note.)

CONSENSUAL CONTRACTS.—We now come to the four kinds of contracts made simply by consent. No writing nor earnest is necessary; they may be made *inter absentes*, and all give rise to *bonæ fidei* actions. They are all bilateral, i.e. both parties are bound by them, whereas contracts under the three former heads were unilateral, except so far as *commodatum*, *depositum*, and *pignus* might give rise to *actiones contrariæ*. These four kinds of contract are sale, letting and hiring, partnership, and mandate. (Tit. 22.)

i. SALE.—The contract of sale is formed as soon as the price, i.e. a definite sum of money, not anything else than money, is fixed on. Earnest (*arrhæ*), previously to Justinian, only served as a proof that the contract had been made. (Tit. 23. pr.)

Justinian made two changes. 1. If the parties chose to reduce their contract to writing, which they need not do, he enacted that they should not be bound until it had been reduced to writing, and one of three conditions had been fulfilled: viz. that the writing was (*a*) written by the parties, or (*b*) signed by them, or (*c*) formally written by a notary. 2. The earnest (*arrhæ*), instead of a proof of the contract, became a measure of damages for not fulfilling the contract, whether written or unwritten, the purchaser forfeiting the earnest if he retracted, and the seller if he retracted forfeiting double.

The thing sold must be defined in some way, but it might be defined in many ways, as, e.g., by selling at so much a head the fish to be caught on a day, *rei speratæ emptio*, or the chance of the whole take of fish on a day, *spei emptio*. (Tit. 23. pr., and note.)

The price must be fixed and certain. If a thing is sold at the price at which Titius shall value the thing, Justinian decides that if Titius does fix a value this is a contract of sale; but if he does not, there is no contract of sale. (1.)

The price must be in money, or else the contract is one of exchange (*permutatio*), not sale, the difference being that, if a contract of sale was made, the consent was the basis of the contract, but in exchange the contract was made *re*, by the delivery of one thing in exchange for which the other thing was to be given. (2.)

The duties of the seller were, 1, to deliver the thing and to give lawful and undisturbed possession of it (not to give the *dominium* of it). 2. To recompense the buyer, if evicted. 3. To secure the buyer against secret faults. If secret faults were discovered, the buyer might at his option, (*a*) by an *actio æstimatoria* recover damages, greater or less, according as the seller knew (or did not know) of the faults, or (*b*), by what was termed *redhibitio*, get the contract rescinded, and return the thing to the seller. But this was not all. In order to fortify himself, the buyer frequently exacted by stipulation a promise from the seller that he would give him the *dominium*, and that if the buyer was evicted, he would pay him double the purchase money. After the use of this fortifying stipulation had become familiar, it was held that custom so far imported such a stipulation into the contract, that the

buyer, who had not demanded such a promise, and who, therefore, could not sue *ex stipulatu* if evicted, yet, if evicted, could, in the *bonæ fidei actio empti*, recover double the purchase money, on the ground that the seller ought to put the buyer in as good a position as if the stipulation had been made.

The buyer was bound, 1, to make the seller the receiver of the money fixed as the price, and, 2, to pay interest from the day of receiving the thing until he paid the price. (2, note.)

The contract of sale was complete when the price was fixed, but the thing sold remained in the ownership of the seller until he delivered it. If, after the sale was made, the thing bought improved in value, the buyer profited, and if it lost in value without the fault of the seller the buyer had to take it as it was. The risk, after the price was paid, was that of the buyer, and if the thing was wholly lost, by some cause beyond the control of the seller, the loss fell on the buyer, not on the seller, although the seller was the *dominus*, while generally it is true that *res domino perit*. But then the seller had to take the care of a good *paterfamilias* of the thing while it was in his custody, and if he did not, the buyer could sue him for damages; and, if the seller chose, he might take even a further responsibility and specially engage to be answerable even beyond the measure of responsibility of a *bonus paterfamilias*, as, e.g., that a slave purchased should not in any case escape out of his custody. If the thing, while retained by the seller, was injured or stolen by a third person, the seller had to cede to the buyer the action which, as *dominus*, he had against the wrongdoer or thief. (3.)

The contract of sale might be made to be fulfilled on a condition happening, or to be at an end on a condition happening, or with a subsidiary agreement added to it, such as (*a*) that it might be rescinded if the seller had a better offer before a given day (*in diem addictio*), or (*b*) a *lex commissoria*, a general agreement for the rescission of the contract, if not executed, this agreement being specially used to enable the seller to get back the thing if he had delivered it, and was not paid by a certain day. A seller could, under Justinian, have a sale rescinded, or the difference made up to him, if he had sold for less than half the value. (4.)

If the seller knowingly sold something that cannot be sold, as a *res publica*, or a freeman, the buyer, if he bought in ignorance, could recover from the seller all he had lost by entering into the bargain; he could, e.g., get interest on his purchase money.

The *bonæ fidei actio* of the buyer was termed *ex empto* or *empti*, that of the seller *ex vendito* or *venditi*. (5.)

ii. Letting on Hire.—The contract of letting and hiring (*locatio-conductio*) is the second of the consensual contracts, and was formed as soon as the price of the letting (*merces*) was fixed. The three heads of this contract were, 1, *locatio-conductio rerum*, where one person let and another hired a thing; 2, *locatio-conductio operarum*, where one person let his services and another hired them; 3, *locatio-conductio*

operis faciendi, where one person, the *locator*, delivered over a thing, to have something done to it for a price, by another person, the *conductor*. (Tit. 24. pr., and note.) The price must be fixed, but might be left to be fixed by another person (1), but if no price was fixed the contract was not technically one of *locatio-conductio*, but was an innominate contract. The price must be in money, and so if one man lets his ox in exchange for the hirer in turn letting his ox to the first letter, this is not *locatio-conductio*, but an innominate contract. (2.) Emphyteusis, which resembles sale in regard to the largeness of the interest passed by it, and *locatio-conductio* inasmuch as the property still remains in the creator of the emphyteusis, was declared to be a separate form of contract by Zeno. In the absence of special agreement to the contrary, the risk in emphyteusis of a total loss fell on the owner, the risk of a partial loss fell on the occupier. (3.) If a man gives his gold to a goldsmith to have rings made of it for a fixed price, this is *locatio-conductio;* but if the rings are to be made of the gold of the goldsmith, it is a sale. (4.) The hirer has to bestow on the thing hired the care of a *bonus paterfamilias*, but fortuitous loss falls on the owner, that is, the letter (5); a distinction being thus established between the contract of *locatio-conductio* and that of sale, where the risk of fortuitous loss is not with the *dominus*, the seller, but with the buyer who still remained possessor in the eyes of the law. The duties of the letter were, 1, to give the hirer the free use of the thing; 2, to guarantee him against eviction; 3, to reimburse him for necessary or useful expenses. The duties of the hirer were, 1, to give the care of a *bonus paterfamilias* to the custody of the thing; 2, to give the thing up when the term of hiring was at an end; and 3, to pay the agreed price of hiring. (Tit. 24. pr.)

The contract was terminated, 1, by the death of a person who had contracted to let out his personal services or who specially was to do a thing; but it was not terminated in other cases by the death of the *locator* or *conductor*, the contract passing to the heirs of each (6); 2, by the sale of the thing, the *conductor* having a right to damages against the *locator* for being turned out, but having no title to hold against a purchaser; 3, by rent being two years in arrear; or by gross misuse on the part of the *conductor;* 4, by the *locator* having indispensable need of it; and, 5, by the *conductor* being prevented from getting benefit from it, as by armed force. (6, note.)

The hirer had the *actio conducti;* the letter had, 1, the *actio locati*, and, 2, a real action, *actio Serviana*, by which he was enabled to seize on the farming instruments of the hirer of land if rent was not paid; and, 3, could apply for the *interdictum Salvianum*, by which he got possession of things pledged for the rent of land. (Tit. 24. pr.)

iii. PARTNERSHIP.—The third kind of consensual contracts, partnership, may be considered under the following heads:—

1. *The objects of the partnership.*—Partnership might be (*a*) *universorum bonorum* (κοινοπραξία), of everything belonging or accruing

to each partner in any way, and goods belonging to the partners at the time of the contract passed to all without delivery; (*b*) *universorum quæ ex quæstu veniunt,* of things acquired in the course of business, but not of inheritances, legacies, &c.; (*c*) *negotiationis alicujus;* (*d*) *vectigalis,* for farming the public revenues: (*e*) *rei unius.* (Tit. 25. pr., note.)

2. *The shares of the partners.*—In the absence of special agreement each partner has an equal share in the profit and loss. (1.) But they may agree that one-third of the profits and one-third of the loss shall belong to one partner—or one may have the profit after a balance has been struck and not be responsible for loss—or one may contribute money and another only services; but a leonine partnership, by which one partner took all the profit, was not permitted. (2.) If a share of gain is assigned to one partner, he has, in the absence of special agreement, to take an equal share of loss. (3.)

3. *The dissolution of the partnership.*—A partnership was dissolved (*a*) *ex personis,* when one partner was dead or incapacitated. As to death, it may be remarked that the death of one of many partners dissolved the whole partnership, but that a *societas vectigalis* passed to the heirs. (5, note.) Incapacity might under Justinian be caused by *publicatio* or confiscation, when the *fiscus* was looked on as the successor; and this was one of the consequences of the *maxima* or *media capitis deminutio.* (8, note.) (*b*) *Ex rebus,* when the purpose of the partnership has been accomplished, or the condition to which it was made subject, for partnership might be made conditionally, has been fulfilled (4, note), or when the subject matter of the partnership has ceased to exist, as in the case of a *cessio bonorum,* when the goods of the insolvent were all lost to him. (7.) But the outgoing partner might form a new partnership with his old partners, and as partnership, being a contract *jus gentium,* could be formed with a *peregrinus,* a new partnership might be formed even with a person who, having undergone the *media capitis deminutio,* had lost his *civitas.* The *minima capitis deminutio* did not dissolve a partnership, and a person arrogated or emancipated was still a partner. (8.) (*c*) *Ex voluntate,* when one partner wished to retire; but if, when the partnership is *universorum bonorum,* he renounces from a desire to profit exclusively by some gain, as an inheritance accruing to himself, he is compelled to share this gain with his partners. (4.) (*d*) *Ex actione,* when one partner compelled a dissolution by action. (*e*) *Tempore,* by the time during which the partnership was to last having expired.

4. *The powers and duties of the partners.*—Each partner was the mandatary of the others, but, for anything beyond mere ordinary administration, required an express *mandatum.* Properly, only the particular partner who was party to a contract could sue or be sued by third parties, but the prætor, if necessary, allowed actions to be brought by or against the other partners. Each partner had a *bonæ fidei* action *pro socio* against the others to recover his just expenses

and make them answerable for his losses or their negligence. (2, note.) Each partner was bound to take as much care of goods belonging to the partnership as he did of his own, and to this extent he was answerable, not only for *dolus*, but *culpa*. (9.)

There was such a *fraternitas* between partners, that while on the one hand a partner could not in an *actio pro socio* be condemned beyond his means (*beneficium competentiæ*), yet condemnation in this action carried infamy with it. If a partner committed a delict against his partners, they had the appropriate *actio ex delicto* against him, and a partition of the partnership property could be enforced by an *actio communi dividundo*. (9, note.)

iv. MANDATE.—The fourth of the consensual contracts is mandate, by which one person charges another to do something: originally, one friend (the *mandator*) charges another friend, in whom he has confidence (the *mandatarius*), to do something for him, and as a pledge places his hand in his friend's (*manus datio*). The relations thus created were afterwards enforced by the *bonæ fidei* actions *mandati directa*, by which the *mandator* compelled the *mandatarius* to account to him, and *mandati contraria*, by which the *mandatarius* compelled the *mandator* to reimburse him for expenses and losses. (Tit. 26. pr., note.) The original character of the contract was traceable in mandate always remaining a gratuitous contract (13), and the *mandatarius* who was adjudged in an action to have failed to discharge his duty was stamped with infamy. (Tit. 26. pr., note.)

Gradually the scope of mandate was much enlarged by the prætor allowing third parties with whom the *mandatarius* had contracted to sue or be sued by the *mandator*, in the form of *actiones utiles*. There were still some acts, such as making a testament, or entering on an inheritance, which every man must do for himself; but, in general terms, it may be said, that a law of agency was thus created, as these actions could be brought without the concurrence of the agent or procurator, and thus the principal and third parties were placed in direct relations. (Tit. 26. pr., note.)

Forms of Mandate.—Mandate may assume five forms, according to the persons interested in the contract. It may be made (*a*) for the benefit of the *mandator* only, as when he charges the *mandatarius* to buy an estate for him. (1.) (*b*) For the benefit of the *mandator* and the *mandatarius*, as, 1, when the *mandator* guarantees a loan which the *mandatarius* makes with interest to a third party, but for the benefit of the *mandator*; or, 2, when the *mandator*, being already a *fidejussor*, gives the *mandatarius*, who is about to sue him as such, a mandate to sue the principal at the risk of the mandator (here both gain, or rather, before Justinian introduced the *beneficium ordinis*, they gained, the *mandator* by having the principal sued first, and the *mandatarius* by having two persons to sue, one after the other); or, 3, when the debtor gives the creditor a mandate to stipulate for something owed to the *mandator* by a third party. (Here again both benefit; the

mandator gets his debt collected for him, and the *mandatarius* has two persons to sue.) (2.) (*c*) For the benefit of a third person, as a mandate to manage the affairs of Titius. (*d*) For the benefit of the *mandator* and a third person, as when the *mandatarius* is charged to buy an estate for Titius and the *mandator* jointly. (*e*) For the benefit of the *mandatarius* and a third person, as when the *mandator* charges the *mandatarius* to lend money at interest to Titius, an opportunity of lending money at interest being here, as above in (*b* 1), treated as a benefit to the lender. (5.) A mandate for the benefit of the *mandatarius* only, as to invest his money in the purchase of an estate, is merely a piece of advice, and cannot be reckoned a mandate at all, unless the *mandator* meant to say that if his advice was followed, he, and not the *mandatarius*, was to take the risk. (6.) A mandate may be made conditionally, or to have effect from a particular time. (12.)

Mandate used as a mode of Suretyship.—A mandate was almost the same as *fidejussio* as a means of creating suretyship, and was subject to the same general rules as to the inability of women, under the *senatusconsultum Velleianum*, to enter into it for this purpose, and as to the benefits of discussion (*ordinis*), i.e. that the principal should be sued first, under Justinian, and of division, that is, that the liabilities of co-sureties should be divided among them, under Hadrian's rescript, and, to some extent, of the cession of actions. But the *mandator* and *fidejussor* differed in some respects. 1. The *mandator* was considered sometimes more responsible. It was, for instance, doubted by the jurists whether, if an adolescent who had borrowed under a guarantee was *restitutus in integrum*, the creditor or the *fidejussor* was to suffer the loss, but it was considered clear that the *mandator* rather than the creditor was to suffer. 2. Before the time of Justinian, who placed them on an equality, the *fidejussor* was released by the principal being sued—not so the *mandator*, as his contract was a separate one. 3. The *fidejussor* could not demand that the actions against the debtor and the co-sureties should be ceded to him after a *litis contestatio* in a suit by the creditor against the *fidejussor*; but the *mandator* was not affected by a *litis contestatio* or judgment in an action against the debtor. 4. The *mandator* was released if the creditor had wilfully abandoned any of the remedies the *mandator* could call on him to cede, while the *fidejussor* could only call on the creditor to cede such as he had to cede. (6, note.)

Duties and powers of the Mandatarius.—No one need accept a mandate, but, if accepted, it must be executed, unless renounced soon enough for the *mandator* to carry out his purpose himself or through another. Otherwise the *mandatarius* will be liable to an *actio mandati*, unless some such reason as a sudden illness or enmity has prevented him from renouncing or renouncing soon enough. (11.) If the *mandator* revokes before execution, the mandate is at an end. (9.) A mandate is also extinguished, if, before it is executed, either the *mandator* or *mandatarius* dies, but the *mandatarius* has an *actio mandati*,

if he executes the mandate when the *mandator* is really, but not to his knowledge, dead; just as a payment to a steward, enfranchised or ceasing to have power to act as steward, is good against his master if the person paying the money does not know that the steward is not still a slave or has ceased to have power to act as steward. (10.) A mandate *contra bonos mores*, as to commit theft, is not obligatory; the *mandatarius* may have to pay a penalty in such a case, but he has no remedy against the person who charges him to commit the theft. (7.) The *mandatarius* must not exceed the limits of his mandate. If a *mandator* charges the *mandatarius* to spend 100 *aurei*, the *mandatarius* may spend less, but not more; and he can make the *mandator* responsible up to 100 *aurei*, though not for the excess. (8.) In the execution of the mandate, the *mandatarius* was bound to exercise the diligence of a *bonus paterfamilias*. (11, note.)

Gratuitous character of the Contract.—A mandate is always gratuitous; and a contract which, if gratuitous, would be a mandate, will, if not gratuitous, almost always take the form of *locatio-conductio*, and so *vice versa*, if a person gives out his materials to be done something with, but does not fix the price, an *actio mandati* may be brought. But although the mandate was gratuitous, yet an honorary payment (*honorarium*) might be arranged for and given, as to doctors, &c., and although the payment could not be enforced by an action, yet the magistrate in the exercise of his extraordinary jurisdiction would regulate it and see it was paid. (13.)

OBLIGATIONS QUASI EX CONTRACTU.—We now come to cases where an obligation exists, not arising from a contract, but from such a state of things that one man is bound to another as if there was a contract. These obligations, moreover, resemble not only obligations generally, but those arising from some particular form of contract. The first three of the examples that follow, for instance, closely approach obligations arising from a mandate. The next two closely approach obligations arising from a *societas*. The last closely approaches the obligation arising from *mutuum*. (Tit. 27. pr. 6.)

The following are the examples (which are merely examples) given in the Institutes.

1. If one man manages the affairs of another who is absent, without being charged to do so, there is no contract between them, but, in order that the affairs of absent people might not be neglected, the law treated the parties as if a mandate had been given, the person whose affairs had been managed having an *actio negotiorum gestorum* against the *gestor* to make him account, and the *gestor* having an *actio contraria* against him, but (in distinction to the case of a mandate) only for what he has usefully expended, not for all his expenses. The *gestor* has to show the diligence of a *bonus paterfamilias*. (1.)

2. Tutors and, 3, curators are bound to the pupil or adolescent, who have a direct action to make them account, and are subject to a contrary action for losses and all expenses. (2.)

4. If two persons, not being partners, have a thing in common, and one has received the fruits or borne necessary or useful expenses, he can be sued or sue as if the other had been a partner (3); and, 5, the same may be said of two co-heirs, who have a right to apply to have the inheritance divided. (4.)

6. The heir, though not bound by a contract to the legatee, is under an obligation to him, *quasi ex contractu*, to carry out the dispositions of the testator, and the legatee had an *actio ex testamento* to make him do this; having also, if a particular thing was so given as a legacy as to give the legatee the right to bring a *vindicatio*, the choice between the real and the personal action. (5.)

7. A person to whom money not due is paid by mistake, is not bound by a contract, for payment is generally rather the fulfilment than the origin of a contract, but he is bound to repay it by an obligation *quasi ex contractu*. (6.)

In order that the person paying might be able to recover, three conditions must be fulfilled: (*a*) the payment must be really not due; a person could not recover if what he paid was due, although by a merely natural obligation, or if he paid sooner than necessary what he must some day pay; but he might recover what he paid under a conditional undertaking before the event happened; (*b*) he must have paid under a mistake arising from ignorance of fact or, perhaps, of law; for if he paid knowingly he was treated as having made a gift. (6.) In one case, money paid when not due could not be recovered; viz. when he who paid was liable, on denying liability, to pay double the amount claimed, as he would be if he denied that a judgment pronounced against him had been pronounced, or in actions under the *lex Aquilia*, or, before Justinian, in cases of legacies given *per damnationem*. Justinian put all legacies and *fideicommissa* on the same footing in this respect, but only in favour of certain legatees, such as churches, asylums, monasteries, and so forth. If a person in such cases chose to pay the simple sum claimed, he could not recover it, as he was taken to have paid it to obtain security from the penalty. (7.)

The person who had paid money by mistake was much in the position of a person who had made a *mutuum*, and the *condictio indebiti*, by which he recovered, closely resembled the *actio ex mutuo*. But the *solutio indebiti* extended to many other things than the payment of money. It comprehended anything done or given over by mistake, and the analogy to the *mutuum* ceased to be apparent. (6, note.)

Acquisition of Obligations through others.—Fathers and masters acquire obligations, i.e. are creditors, and can bring actions, through sons *in potestate* (subject to the changes made by Justinian as to the *peculium*, the father, however, having alone the right to bring the action when he had the usufruct) and slaves. (Tit. 28. pr.) In the cases of slaves, or of persons supposed to be slaves, of whom there is *bona fide* possession or a usufruct, the master acquires the obligations as to all that arises from their labours or from something belonging

to the master. In the case of slaves of whom the master has the use, the master acquires the obligations as to all that arises from their labours expended on the master's property. (1, 2.) The slave held in common acquires, in the absence of something to show the contrary, for his masters in proportion to their interest in him. (3.) The Institutes do not notice the acquisition of obligations through procurators.

Dissolution of Obligations.—The last Title of this Book treats of the dissolution of obligations, and the case of obligations being dissolved *ipso jure* must be distinguished from that of the right to sue on an obligation being met by an exception, a subject reserved for the 4th Book. There are three modes of the dissolution of contracts noticed in the Institutes: 1. Payment; 2. Novation; 3. Use of a form of dissolution corresponding to the form of the obligation. (Tit. 29.)

i. *Payment.*—*Solutio*, a term applicable generally to every mode of loosening the tie of the obligation, is specially applied to payment in its widest sense, i.e. executing the contract. There are as to this three questions to be answered: 1. Who may pay? Either the debtor himself may pay, or any third person with or without the debtor's knowledge, or even against his will, may pay for him. If the debtor pays, the *fidejussor* is released, and if the *fidejussor* pays and does not require the actions to be ceded to him, the principal is released. 2. To whom might the payment be made? To the creditor himself, his authorised agent, to the tutor, curator, or authorised pupil. 3. What might be given in payment? Not only the thing itself, but, with the consent of the creditor, something else in lieu of it. (Tit. 29. pr.)

ii. *Novation.*—Novation is the dissolution of one obligation by the formation of another. Any contract, civil or natural, could be extinguished by a new contract, operating either civilly or naturally, being formed; the new contract being one either *litteris*, or (so generally as to be spoken of as the one recognised mode) *verbis*. The new contract must be different from the old, and might be different in three ways: 1. The terms might be altered; 2. A new debtor might be introduced, and even if the new debtor is unable, as e.g. an unauthorised pupil, to contract, still, though the new contract, except as a natural obligation, is void, yet the first is extinguished; but it would be otherwise if the new contract had been made with an unauthorised slave, for then there would be no new contract at all. The new debtor might be substituted even without the consent of the old debtor; this new debtor was termed *expromissor*, in the strict sense of that word. If the old debtor substituted another person as the new debtor in his own place, this was termed *delegatio*. A new creditor might also be introduced. 3. If the parties remained the same, then, if the preceding contract was not a stipulation, the forming the same contract by stipulation operated as a novation of the first contract; but if the preceding contract is a stipulation, something new must be introduced; conditions of time or *fidejussores*, for example, must be added or taken away. If the second contract is made conditionally, the first is not extinguished until the

second becomes operative by the condition having been fulfilled. (3, and note.)

Justinian enacted that no contract should be extinguished by a new one being formed, unless the parties clearly expressed their intention that this should be the effect of the new contract. (3.)

Both the *litis contestatio* and a judgment produced a *novatio*, but the effect was not exactly the same as in *novatio* proper, as the beneficial accessories of the old contract, such as pledges and interest, were continued. (3, note.)

iii. *Form of Dissolution corresponding to the Forms of the Obligation.*—If payment was not made, nor novation made by a new stipulation, and the parties had made a contract of *nexum*, or *verbis*, or *litteris*, a form (*imaginaria solutio*) had to be gone through to get rid of the contract, corresponding to the form in which the obligation had been contracted. A *nexum* was dissolved by the debtor striking the scale with a piece of money and giving it to the creditor as representing the debt; and this form was used to remit payment of a legacy *per damnationem*, or of money due on a judgment, or of anything certain, *pondere, numero mensurave*. (Tit. 29. pr., note.) A contract *verbis* was dissolved by *acceptilatio*, i.e. by the creditor saying *Habeo* to the debtor's question *Habesne acceptum?* (1.) A contract *litteris* was dissolved by the debtor making the *expensilatio* of an imaginary payment in his books.

A contract *re* was dissolved by the thing being returned, and one made *consensu* was dissolved by consent, if each party could be put in his former position. (4.)

If a contract had been made in some other way than *verbis*, and the parties subsequently went through an *acceptilatio*, this operated as giving an exception preventing the creditor from suing. But in order that the preceding obligation might be extinguished, and not merely an exception allowed, there was invented what was termed the *Aquilian* stipulation. The terms of the former contract were thrown into the form of a stipulation, which extinguished the old contract by novation, and then this new stipulation was dissolved by *acceptilatio*. (2.) *Acceptilatio* may be applied to a part of a debt as well as to the whole. (1.)

There were also the following modes in which an obligation might be dissolved besides the three above mentioned: 1. The obligation becoming impossible to execute, as if the thing perished. 2. *Confusio*, i.e. the *personæ* of the creditor and the debtor becoming merged, as if the debtor became heir to the creditor. 3. *Compensatio*, or set-off, in the sense that it was taken notice of in *bonæ fidei* actions without an exception. (4, note.)

BOOK IV.

DELICTS.

We now proceed to notice obligations arising *ex delicto*, or *quasi ex delicto*.

Delicts.—Obligations arising from delicts—i.e. violations of the rights of property, or of any of the other rights *in rem*, such as liberty, security, or reputation—arise from the thing done (*ex re*), without necessary reference to an evil intent, and the kinds of delicts recognised by the law are four:—*Furtum, rapina, damni injuria, injuria.* (Bk. iv. Tit. 1. pr.)

Furtum.—Theft is the fraudulent dealing with a moveable thing, including things moved from the soil, or with its use or its possession. (1.) By fraudulent is meant 'with the intention of committing a theft,' and among *impuberes* it was only a person *pubertati proximus* who was held old enough to have such an intention. (18.) If a borrower converts the thing borrowed to a purpose other than that for which it was lent, he does not commit a theft, if he honestly thinks the owner would permit it (7), or, whether he thinks so or not, if the owner would, as a matter of fact, have permitted it. (8.) But a person tempting a slave to bring him the property of his master, and then receiving the things by direction of the master to whom the slave has revealed the facts, is guilty both of theft and of corrupting a slave. (8.) There is theft of the use of a thing, as when a creditor or a depositary uses for his own purposes the thing committed to him as a pledge or in deposit, or a borrower uses a thing for a purpose other than that for which it is lent, e.g. borrows a horse for a ride, and takes it into battle. (6.) There is theft of the possession, as if a debtor takes from the creditor the thing he has pledged to him. Free persons, as, e.g., children *in potestate*, are among the things that may come within the law of theft. (10.) A person who assists in a theft, as by placing a ladder by which the thief mounts, is liable to an action of theft, but not so if he only counsels the theft. (11.) If persons in the power of another steal from that person, they cannot be sued for theft by that person, but the thing is *furtiva*, and cannot be acquired by usucapion, and a person assisting them is liable to an action of theft. (12.)

In case of theft the owner of the thing could sue for the thing, if in the possession of the thief, by the ordinary means, *vindicatio*, or an action *ad exhibendum*, and, if the thing was no longer in the possession of the thief, he could recover the value of the thing stolen and interest by a *condictio furtiva*, or he might, if he pleased, bring this action

although the thing was in the thief's possession. But, besides these actions, he had an *actio furti*, an action to recover a penalty for the wrong done him; but this, though it could be brought by the heirs of the owner, could not be brought against those of the thief. (19, and note.) It could, as we have just seen, be brought against the accomplices of the thief. (11.)

Two questions arise as to this action. 1. What was the amount of the penalty? 2. Who could bring the action?

1. The amount of the penalty varied according as the theft was manifest or not manifest. A manifest theft is one in which the thief is detected in the act, or in the place of the theft, or with the thing on him before he reaches his destination. The penalty for a manifest theft, which had been under the Twelve Tables for a slave death, and for a freeman being given over as a slave to the person injured, was fixed by the prætors at four times the value of the thing stolen. The penalty for non-manifest theft was twice the value. Any accidental circumstance that, at the time of the theft, gave a special value to the thing, was reckoned in the value, the quadruple or double of which was to be given. (3, 5.) In the older law there had been other variations of theft, or concealing stolen property, to which actions had been attached, with varying penalties, under the heads of *furtum conceptum*, *oblatum*, *prohibitum*, and *non exhibitum*. (4.)

2. The person or persons who were interested in the thing not being lost could bring the *actio furti*. In the case of a thing subjected to a usufruct, both the *dominus* and the usufructuary had such an interest, and both could bring the action. (13, note.) The creditor, from whom a thing given in pledge is stolen, even if the debtor is the thief, may bring it, because to have the thing pledged in possession is a gain, although the debtor may be able to pay. (14.) The *bona fide* purchaser, too, has the action, although he is not the *dominus*. (15.) The *conductor operis*, the tailor or fuller who has clothes to mend or clean, can bring the action, if he is solvent, and the owner cannot; for as he has his remedy against the tailor, the owner has not an interest: but if the tailor is insolvent the owner can bring the action. (15.) The same rule applied before Justinian to the borrower under a *commodatum*, but under Justinian the lender had his choice. If he chose to bring the action against the thief, the borrower was freed from responsibility. If, knowing of the theft, he chose to sue the borrower, then the borrower had the action against the thief so far as he paid, but the lender had not, whether the borrower was solvent or not. If the lender, ignorant of the theft, brought an action against the borrower, he might, on knowing the facts, desist from that action, and sue the thief, and then the borrower was free, whatever the result of the action against the thief might be. (16.) A depositary, not being answerable for *culpa levis*, had no interest sufficient to support the action, and the owner only could bring it. (17.) A mere interest in a thing not delivered being safe, such as that of a person to whom a thing was due under a stipulation,

or that of a creditor in anything belonging to his debtor, was not sufficient to support the action. (13, note.) A separate action against each offender could be brought for the full penalty. (17, note.)

Bona vi rapta.—The prætor instituted an action to meet the case of goods being taken by violence, the plaintiff being allowed to recover, if he brought his action within a year, the thing or its value, and also three times its value as a penalty; or, if he brought his action after a year, the thing, or its value, only. It was necessary that the act should be committed *dolo malo*, and not through an honest mistake, but the value of the thing was immaterial, and one person acting alone could commit the act; nor did it make any difference whether the robber was or was not taken while committing the robbery, but the action, being partly penal, could not be brought against the heirs of the wrongdoer. (Tit. 2. pr., 1.) It was not necessary that the thing taken should have been among the goods of the plaintiff. If it was taken from among his goods, that was enough; and so even the depositary might bring this action, as could all those who could bring an *actio furti*. (3.) The *actio vi bonorum raptorum* only applied in case moveables were taken, but a constitution of Valentinian, Theodosius, and Arcadius provided that if moveables were taken, or immoveables seized on by force, the wrongdoer, if he was the owner, lost the property in the thing; if he was not the owner, he had to give up the thing and to pay its value by way of penalty. (1, note.)

Lex Aquilia.—The *lex Aquilia* consisted of three heads, the second of which had reference to *acceptilatio*, and it is only the first and third which bear on the subject of delicts. (Tit. 4. pr.)

1. The first head gave an action *damni injuriæ* to the owner of a slave or any quadruped reckoned among cattle, i.e. horses, asses, swine, &c., but not dogs or wild animals (1), killed without right, but without reference to the intent of the wrongdoer. Was the person killing the slave in fault? was the question asked. A soldier throwing a javelin in a place appropriated to military exercises, and accidentally killing a slave, would not be liable, but if he was in any other place he would be. (4.) A person cutting down a tree near a public path would be liable if he did not give warning, but not if he gave warning, supposing the tree fell on and killed a slave. If the tree was in the middle of a field, he would not be in fault, and therefore not liable, even though he gave no warning. (5.) Neglect or unskilful treatment on the part of a physician, leading to the death of a slave, would make the physician liable (6, 7), and a muleteer, killing a slave by his mules running away, would be liable if a stronger man could have held them in. (8.)

The penalty was the greatest value of the slave or animal killed at any time within a year, not the actual value at the time of death, and, as the action was thus penal, it did not lie against the heirs of the wrongdoer. Interpretation of the law decided that in the greatest value was to be included all consequential loss, as if the slave, had he lived, could have entered on an inheritance for the owner; or if a set or pair of slaves

or animals was spoiled by one perishing (10), and if the defendant denied his liability, the penalty was doubled. The owner, besides the action under the *lex Aquilia*, might also bring a criminal charge against the person who killed a slave. (11.)

2. The third head provided for every kind of damage (*damnum*) done wrongfully to a slave, or any four-footed beast, including dogs and wild animals, or to goods, as by mixing anything that spoils wine or oil. (13.) But the penalty under this head was the greatest value of the thing, not within a year, but within thirty days.

For a direct action to lie under either head of the *lex Aquilia* the injury must be done bodily by the wrongdoer to the body of the slave or thing injured. If it was not done bodily by the wrongdoer, if he only did something by which the body of the slave or thing was injured, as if he shut up a slave or animal, and let death come from starvation, then the prætor gave an *actio utilis* under the *lex Aquilia*. If the injury was done to the owner, not by the body of the wrongdoer, nor to the body of the slave or animal, as, e.g., if a person loosed the fetters of a slave to allow him to escape, the *lex Aquilia* did not apply at all, and the owner must have recourse to an *actio in factum*, by which he would obtain compensation according to the value of the thing to him, if there had been *dolus* or *culpa lata*, or the ordinary value if not. (16, note.)

The *utilis actio* under the *lex Aquilia*, was also given to persons having an interest less than ownership in the slave or animal, as to a possessor or a usufructuary. (16, note.)

The whole penalty could be recovered from each offender, if there was more than one. If the person injured could also bring, and brought, an action, under a contract, for the injury, he could afterwards bring an action under the *lex Aquilia* to recover the excess which that law would give him as a penalty beyond what he could recover on his contract. (16, note.)

Besides *damnum factum* the prætor took cognisance of *damnum infectum*, threatened damage, and forced the owner of the property from which damage was apprehended to give security against possible loss. (16, note.)

Injuria.—This term, which may be applied to any wrongful act, or to any judgment given against law, has the special meaning of an outrage or affront, and it is in this sense that it is here used. (Tit. 4. pr.) It is the insult that is the gist of the offence. Examples of an injury in this sense are striking any one, publicly insulting him, falsely pretending that he is the insultor's debtor, libelling him, soliciting chastity, &c. (1.) The *paterfamilias*, as himself insulted, might bring an action if any of those in his power was insulted; and often several persons might have the right of action at the same time; as, if a married woman was insulted, while she and her husband were both *in potestate*, she, her own father, her husband, and her husband's father all had a right of action, and, as the penalty was in proportion to the gravity of the insult, and this partly depended on the rank of the person insulted, the son, if of

higher rank than his father, might obtain more by bringing the action, or having it brought in his name. (3.) It was only if the insult was *atrox*, very grave, as e.g. a severe flogging, that an injury to a slave was considered an injury to the master. (3.) If the slave, in such a case, belonged to several masters, the insult was taken to be done in proportion, not to their interests in the slave, but to their rank (4), and, except the contrary appeared, the insult was taken to be to the owner, not to the usufructuary, of a slave. (5.) If it is a freeman in the employ of another, who is injured, he alone can bring the action, unless the injury to him was caused simply for the purpose of insulting the employer. (6.) The old penalty was a limb for a limb, but the prætor substituted the penalty of allowing the parties injured to fix the damages, subject to reduction by the judge. Regard was had to the rank of the person insulted, and to the class to which, in case it was to a slave that the injury was done, the slave belonged. (7.)

Atrox injuria.—Besides *injuria* simple, we have to consider *atrox injuria*, or aggravated insult; the aggravation arising from the nature of the insult, the place where it was done, the rank or office of the insulted, or the part of the body affected, e.g. the eye. (9.) The consequences of the *injuria* being *atrox* were two. 1. Persons, who could not otherwise, might bring the action, as (*a*) the owners of slaves; (*b*) freedmen against a patron; (*c*) an emancipated son against his father. 2. The damage was fixed by the prætor, and the judge could not reduce it. (9.)

A criminal charge might also be brought for injuries, and persons of very high rank might bring such a charge by a procurator. (10.) Not only the actual wrongdoer, but any contriver of the injury, was liable to the *actio injuriarum*. (11.) But if the person injured showed no indignation at the time, or, though showing indignation, took no steps to obtain reparation within a year, he could not afterwards bring the action. (12.) Unless the stage of the *litis contestatio* had been reached, the action did not pass to the heirs of the person injured. (12, note.)

Obligations quasi ex delicto.—The remaining head of obligations is that of obligations arising from acts which, though not technically coming under the recognised heads of delicts, gave rise under the prætors to similar actions, i.e. to penal actions *in factum* not passing against the heirs.

The instances given are, (*a*) when a judge has made a cause his own, i.e. has given a wrong sentence through favour or corruption or merely ignorance of law (e.g. has condemned a defendant in a sum different from that fixed in the formula), he is liable to an amount to be fixed by the judge. (Tit. 5. pr.) (*b*) When anything has been thrown or poured down from an apartment, the occupier of the apartment is liable to an action that any one might bring (*actio popularis*) for double the damage. If a freeman is killed thereby, there is a penalty of 50 *aurei*. If a freeman is only hurt thereby, compensation is given; his medical expenses and loss of employment being considered. A person keeping anything suspended where there was a public way, likely to fall or do damage,

was liable to a penalty of 10 *aurei*. It made no difference whether the occupier was occupying by one title or another. (1.) But if the occupier was a *filiusfamilias*, the father was not liable; nor was he if the *judex* who made a cause his own was a *filiusfamilias*. (2.) (*c*) The master of a ship, of an inn, or a stable, was liable to an action for double the value for any damage, fraud, or loss caused by fraud or theft on the part of his servants in his ship, inn, or stable.

ACTIONS.

We now come to the last division of the Institutes, which treats of Actions, and, subordinately, of Exceptions and Interdicts.

The mode in which the subject of actions (Tit. 6-12) is treated is this: The Sixth Title discusses the different kinds of actions. The Seventh and Eighth discuss actions to enforce obligations arising from contracts with, or delicts committed by, persons *alieni juris*, and the Ninth treats of injuries done by animals. Then in the Tenth the subject of bringing or defending actions through other persons, and in the Eleventh that of the securities to be given by the parties, are discussed; and lastly, in the Twelfth, the subject of the duration of the right to bring an action, and the question whether actions passed or did not pass to or against heirs, are treated of.

A summary is given, in the note to the introductory paragraph of Tit. 6, of the main divisions of actions under the formulary system.

The first division of actions noticed in the Sixth Title is that of actions *in rem* and actions *in personam*. But it is mixed up with the second division according as actions came from the old civil law or were created by the prætor. The general word for a real action was *vindicatio*, but this word was used in a special sense, as a civil, i.e. non-prætorian, action for a corporeal thing. The general word for a personal action was *condictio*, but the word was used in a special sense, as a personal action, *stricti juris*, excluding *bonæ fidei* actions, actions *ex delicto*, and actions *in factum* (see note to introductory paragraph). (15.) Generally speaking, if a man claimed a thing as his own, he could not bring a personal action for the thing, but *odio furum* a plaintiff could, although he had a real action, bring a *condictio* if a thing was stolen. (14.)

The civil real actions noticed are five. 1. *Vindicatio*, in the special sense of a claim for a corporeal thing. 2. *Confessoria*, 3. *Negatoria*, actions to obtain or protect the enjoyment of servitudes. 4. *Causa liberalis*, an *actio præjudicialis*, to determine whether a person was or was not a freeman. 5. *Petitio hereditatis*. There are also five kinds of prætorian real actions noticed: *actio Publiciana*, *quasi-Publiciana*, *Pauliana*, *Serviana*, and *quasi-Serviana*, and two prætorian kinds of *actiones præjudiciales* are also noticed. The subject of personal actions is treated of in this part of the Title only by giving three examples of personal actions created by the prætor, *de pecunia constituta*, *de peculio*, *de jurejurando*. Further, there are certain actions which are said to be *mixtæ*, i.e. partly real and partly personal.

i. Civil Real Actions.—1. *Vindicatio*, under which head may be noticed the characteristic of real actions, that the *intentio* ran, *Si paret rem ex jure Quiritium Titii esse,* if it appears that Titius has a right against all the world, without the name of any alleged violator of that right being mentioned. (1.) 2. *Actio confessoria*, brought to enforce a servitude contested or impeded, and brought indifferently whether the claimant was or was not in quasi-possession of the servitude. (2.) 3. *Actio negatoria*, brought by the owner of a thing to regain an alleged right of exercising a servitude over that thing, although the owner was in possession, whereas, as a rule, real actions could not be brought by a possessor. The possessor of a servitude had a concurrent remedy in a prohibitory interdict so far as concerned the *actio confessoria*, and in a possessory interdict so far as concerned the *actio negatoria*. (2.) 4. *Actio præjudicialis*, a preliminary action to ascertain a fact, was an *actio in rem*, but only one such action, that to determine whether a man was or was not free, was *civilis*. This action, known as *causa liberalis*, was originally carried on by a person who, as *assertor libertatis*, claimed a slave as against a master, and liberty might be thrice asserted in this way, if on the first two occasions a decision was given for the master. Justinian allowed the slave himself to claim his liberty, and made the first decision final. (13.) 5. *Petitio hereditatis*, or a claim for an inheritance. This (contrary to what was the case with other actions *in rem*) was a *bonæ fidei* action: Justinian decided that *dolus malus* could be taken into consideration in it without any exception being pleaded. It had some affinity to a personal action, as (*a*) it could only be brought against two classes of persons, those possessing an inheritance *pro herede*, and those possessing *pro possessore* (i.e. avowedly without title), and (*b*) the plaintiff could recover by it moneys derived by the possessor from the inheritance, and could enforce by it debts due to the inheritance from debtors claiming to be heirs. (28, note.)

ii. Prætorian Real Actions.—Five instances are given, the first three being fictitious actions, *in jus conceptæ*, the two last being *in factum*. 1. *Actio Publiciana*, given to protect a person who, while the time of usucapion is running, loses the thing out of his possession, and to recover it is allowed to feign that his title by usucapion is complete. (4.) 2. *Actio in rem rescissoria*, given to protect a person against whom the time of usucapion has run, while he was unable through absence or other legitimate cause to attend to his affairs, or if the possessor in whose favour the term was running was absent, and so the usucapion could not while running have been stopped by legal means. The prætor allowed the owner in such a case to rescind the usucapion and to claim the thing by feigning that the usucapion had not been perfected. (5.) 3. *Actio Pauliana*, given to rescind alienation of goods in fraud of creditors. (6.) 4. *Actio Serviana*, by which possession was obtained of the effects of a farmer, looked on as mortgaged in law, to recover the payment of rent. 5. *Actio quasi-Serviana*, by which creditors generally, and not landlords only, obtained things

mortgaged or pledged to them. (7.) Two instances are also given of pre-judicial actions created by the prætor: that to decide whether a person is *ingenuus* or *libertus*, and that to decide whether a person is the son of his reputed father. (13.)

Personal Actions.—Three instances are given of personal actions created by the prætor: 1. *De constituta pecunia*, given to enforce a pact for the payment of a sum already due. Such a pact was advantageous to the creditor if the thing due was owed by another person, or if the antecedent obligation was a natural one, or if the time during which an action on this antecedent obligation might be brought was on the point of expiring; and this action was by Justinian made in all cases perpetual and allowed to be brought whatever was the nature of the thing promised, those qualities having previously belonged only to the *actio receptitia*, an action specially given to enforce an undertaking by an *argentarius* to pay what he owed. (8, 9.) 2. *De peculio*, given to make *patresfamiliarum* liable to the extent of the *peculium* of their sons *in potestate* and slaves, for the engagements of those sons and slaves. (10.) And, 3. *De jurejurando*, given to ascertain whether a party to a suit had, when challenged to do so, sworn that the facts on which he rested his claim or defence were true. (11.)

Mixed Actions.—The actions *familiæ erciscundæ*, *communi dividundo*, and *finium regundorum* are said to be mixed, i.e. both real and personal, because although they were otherwise personal actions in form, yet by the addition of an *adjudicatio* things were adjudged to belong to the different parties. (20.)

Before proceeding to notice the division of actions according to the latitude given to the judge, the Institutes notice two subsidiary divisions.

i. Penal Actions (many of which actions, as *de albo corrupto*, *de parente aut patrono in jus vocato*, and *de in jus vocato vi exempto*, were created by the prætor) (12) as distinguished from actions brought to get the thing only (*rei persecutoriæ*) and those in which both these objects were united (*mixtæ*).—As a rule, all actions *in rem* or *ex contractu* were only *rei persecutoriæ*, except that when an *actio depositi* was brought against a person, or against his heir if personally guilty of *dolus malus*, to whom things had been entrusted under the pressure of sudden calamity, such as fire or shipwreck, when the value of the things and also as much again was recoverable, and so the action was *mixta*. (17.) Actions arising from a delict always carried with them a penalty, and were simply penal in the case of theft, for then the value of the thing was recoverable by a separate action, or were *mixtæ*, as in actions *vi bonorum raptorum*, and under the *lex Aquilia*, and for legacies given but not duly paid to holy places, the value of the thing, and something more by way of penalty, being recoverable by such actions. (18, 19.)

ii. Actions differing according to the amount of the Condemnation.—This goes very nearly over the same ground as the

previous division. i. Actions *rei persecutoriæ*, to get the thing due, were *in simplum*. (22.) ii. Actions (*a*) for non-manifest theft, (*b*) for *damnum injuriæ* under the Aquilian law, (*c*) for deposit when the deposit was denied, if it had been made under pressure of calamity, (*d*) for corrupting a slave, and (*e*) for not paying a legacy given to a holy place, were *in duplum*. (23.) iii. An action given against a person who asked more than due, so that the officials of the court got a larger fee, was *in triplum* of the loss sustained by the payment of this fee, the amount improperly expended being, however, included in the *condemnatio in triplum*. (24.) iv. Actions (*a*) for manifest theft; (*b*) actions *quod metus causa*; (*c*) actions for money paid to hire a man to bring a vexatious suit, or to induce a man to desist from a vexatious suit which he threatens to bring; and (*d*) actions brought against officers of the court guilty of unjust exaction, were *in quadruplum*. (25.) Two observations, however, have to be made. Firstly, of those actions which are said above to be given *in duplum*, that under the *lex Aquilia* and that for deposit under pressure were *in duplum* only if the defendant denied his liability; and in the case of legacies given to holy places, if the defendant denies or will not pay until the magistrate makes an order that the action shall be brought. (26.) Secondly, the *actio quod metus causa*, given to a person who had been threatened or coerced into doing anything, was *in quadruplum* only if the defendant would not obey the preliminary order of the judge (*arbitrium*) and restore the thing. (27.)

We now come to the division of actions according to the latitude of the judge. According to this division, actions are *bonæ fidei*, *stricti juris*, or *arbitrariæ*.

1. Actions bonæ fidei.—In certain prætorian actions, principally those arising out of bilateral contracts, the words *ex bona fide* or some equivalent words were added to *quicquid oportet* in the *intentio*, which was always uncertain, and then the judge had to take all equitable considerations into view in determining the liability of the defendant. The judge in *bonæ fidei* actions took notice of *dolus malus* without an *exceptio doli mali*; noticed customs and usages; took into account counter claims arising out of the same set of circumstances (30); provided for future liabilities arising; and gave interest for the time the thing had been due. (28, note.) A list of actions *bonæ fidei* is given (28, 29): 1, *Empti* and *venditi*, 2, *locati* and *conducti*; 3, *negotiorum gestorum*; 4, *mandati*; 5, *depositi*; 6, *pro socio*; 7, *tutela*; 8, *commodati*, 9, *pigneraticia*; 10, *familiæ erciscundæ*; 11, *communi dividundo*, 12, *de æstimato*; 13, *ex permutatione*; 14, *hereditatis petitio*; 15, *ex stipulatu in exactione dotis*.

This last-mentioned action replaced a *bonæ fidei* action called *rei uxoriæ*, under which the husband had certain advantages when sued by his wife for the restitution of her *dos*. If the wife had stipulated for the restoration of the *dos* to her, she could bring an action on the stipulation which, being *stricti juris*, did not afford the husband those

advantages, the principal of which were, (*a*) that he had three years to make restitution of things *quæ numero, pondere mensurave constant*; (*b*) he had the *beneficium competentiæ*; (*c*) he could deduct the useful as well as the necessary expenses he had been put to in the management of the dotal property (37); (*d*) the wife could not transmit the action to her heir; (*e*) she could not ask for her *dos*, and also for any benefit by her husband's testament. Justinian amalgamated the two actions, calling the new action *ex stipulatu*, although in fact no stipulation might have been made. But he made it *bonæ fidei*, and the husband under it had a year for the restoration of all moveables, and he had the *beneficium competentiæ*, and could deduct necessary though not useful expenses; but he could recover the *impensæ utiles* by a separate action. Justinian, on the other hand, gave the wife a tacit *jus hypothecæ* on all the husband's effects for her *dos*, but this was only available when she herself sued for her *dos*. (29, note.)

2. Actiones stricti juris, i.e. real actions and *condictiones*.—In these actions, *dolus malus* or counter claim could only be taken notice of, if pleaded by an exception, and interest, except by express agreement, only ran from the *litis contestatio*. (28, note.)

3. Actiones arbitrariæ.—In these actions the judge made a preliminary order on the defendant to do something, as to restore or exhibit a thing, or to pay a sum. If this order was not obeyed, then the defendant was to pay a sum fixed in the *condemnatio* so as to meet all the circumstances of the case. If the defendant had the thing in his possession, and had fraudulently put it out of his power to restore the thing, the plaintiff fixed on oath the amount justly due to him, and the *manus militaris* was employed by the direction of the judge to compel him to give it up. All real actions were *arbitrariæ*, and the following personal actions: (*a*) *quod metus causa;* (*b*) *de dolo malo;* (*c*) *ad exhibendum;* (*d*) *de eo quod certo loco promissum est*. (31.)

The action *de dolo malo*, given when there was no other means of avoiding the consequences of *dolus malus*, was *in simplum*, carried infamy with the *condemnatio*, and had to be brought within a year. The *actio de eo quod certo loco* was an action brought by a creditor against a debtor who, having promised and failed to pay in a particular place, was not to be found, and so could not be sued there, and the judge allowed the creditor in this case to sue elsewhere without risk of *plus-petitio*. But the debtor had this advantage: he was given the option of paying or giving security for paying what was due in the right place under an *arbitrium*, and then, if he did not obey the *arbitrium*, he was condemned in an amount in which the benefit it would have been to him to pay in the place named was taken into consideration. (31, note.)

It was the business of the judge to make the *condemnatio* in the formulary system for a sum certain, and under the *judicia extraordinaria* for a thing certain or a sum certain. (32.) And this leads us to

consider three special matters which affected the result of the action. 1. *Plus-petitio.* 2. *Beneficium competentiæ.* 3. *Compensatio.*

1. Plus-petitio.—Under the formulary system, if the plaintiff asked in the *intentio* of an *actio stricti juris* for a thing certain, and asked for more than he was entitled to, he could not succeed in the action at all, and the claimant being barred in most personal actions by the novation operated by the *litis contestatio,* he had no further remedy, unless the prætor chose to give him a *restitutio in integrum,* which was granted as a matter of course to plaintiffs under 25 years, but to persons over that age only if the mistake had been such as a most careful man might have made: as if a legatee had asked for his whole legacy, and then codicils had been discovered by which he lost part or had to share with others. A plaintiff might ask too much in four ways: 1, *re,* in regard to the thing asked for, as if when ten *aurei* were due he asked for twenty, or if when part was due he asked for the whole; 2, *tempore,* in regard to time, as if he asked before the day of payment, or before the fulfilment of a condition; 3, *loco,* in regard to place, as if a creditor sues at Rome for what is due at Ephesus, thus depriving the debtor of any advantages he might have from goods being cheaper or interest lower at Ephesus. But if the debtor absented himself from the place named, the creditor had the *actio arbitraria de eo quod certo loco* mentioned above; 4, *causâ,* in regard to the circumstances of the contract, as if, when the debtor promised to give either one thing or another, the creditor sued depriving him of the choice. It made no difference, even if the thing he asked for was of less value than the other thing. (33.)

If too much was stated in the *demonstratio,* the plaintiff was not prejudiced, and if too much was fixed in the *condemnatio,* the defendant could get the formula rectified. (33, note.)

Under the later emperors, the effects of a *plus-petitio,* i.e. any excess in the *libellus conventionis,* were changed, the plaintiff being no longer shut out from his legal remedy, but being punished for his mistake. If the *plus-petitio* was *tempore,* the plaintiff was, under a constitution of Zeno, obliged to wait double the time he ought to have waited, and to reimburse the defendant all expenses for his loss through the action having being improperly brought. If the *plus-petitio* was in any other way, Justinian made the plaintiff pay three times the amount of loss sustained by the defendant through the action having been improperly brought. (33.)

If the plaintiff claimed in the *intentio* less than was due, he could under the formulary system bring another action for the surplus when another prætor came into office. Zeno allowed the *judex* to add the surplus in condemning the defendant. (34.) If the plaintiff asked for one thing when another was due, he could, under the formulary system, bring another *actio* for the right thing, and under Justinian he could have the mistake corrected. (35.)

In certain actions which may be made a sixth division of actions,

the defendant was condemned in less than was due to him. 1. In the *actio de peculio* a *paterfamilias* could only be condemned in the amount of the *peculium* of his son or slave. (36.) 2. In certain actions the defendant had the BENEFICIUM COMPETENTIÆ, i.e. he was only condemned in so far as he could pay without being reduced to destitution. The instances given are, (*a*) the husband in a suit brought by his wife to get back her *dos* (37); (*b*) an ascendant sued by a descendant; (*c*) a patron sued by a *libertus;* (*d*) one partner sued by another; (*e*) a donor sued for his gift (38); (*f*) a debtor who has made a *cessio bonorum* sued by his creditors after he has subsequently acquired property. (40.) We may add a brother sued by a brother, and all cases, except delicts, when one of two married persons is sued by the other. In all these cases, if the debtor could subsequently pay in full without being reduced to destitution, he had to do so; and in the estimation of what he could pay, his assets only, without deduction for debts, were looked to, except in the one case of the donor, who might deduct his debts.

COMPENSATIO.—In *bonæ fidei* actions, the judge, without any exception being pleaded, set off any debt due from the defendant to the plaintiff from the same set of circumstances (*ex eadem re*). In actions *stricti juris*, the plaintiff could be repelled by an *exceptio doli mali*, if he asked for what was due without having taken into consideration what he owed. It is uncertain whether the exception stopped the action altogether, or whether the plaintiff only recovered any surplus due to him. An *argentarius* who sued a customer without giving credit for what was due of the same kind, as money or wine (*in eadem re*), was guilty of a *plus-petitio* under the formulary system, and failed altogether in his action. A *bonorum emptor* had also, in suing a debtor of the insolvent, to deduct what was due from the insolvent to that debtor; but as the *deductio* was inserted in the *condemnatio*, not, as compensation in the case of the *argentarius*, in the *intentio*, the risk of *plus-petitio* was not run. *Deductio* varied also from *compensatio*, as it included debts of things of different kinds and debts not yet due. Except, perhaps, in this case of the *argentarius*, the two debts did not extinguish each other, until Justinian made them so operate, *ipso jure*, and under Justinian it no longer made any difference whether the two debts were due from the same set of circumstances, or whether things of the same kind were payable, but the defendant's claim was to be a *causa liquida*, i.e. clearly ascertainable. (39, and note.) Justinian allowed no set-off to an action of deposit. (30.)

The subject next treated is that of the responsibility of *domini* and *patresfamiliarum* for the contracts or delicts of those in their power. What is said is, however, chiefly devoted to the contracts and delicts of slaves; what is to be said as to slaves being, with some slight exceptions, applicable to sons *in potestate*. (Tit. 7. pr.)

i. CONTRACTS OF PERSONS ALIENI JURIS.—If the slave was merely the instrument of the master, merely received, e.g., pieces of money made in payment, this was not a contract of a person *alieni juris* at

all. (1, note.) The cases in which the slave did contract may be grouped under four heads.

1. *The slave contracts under the directions of the master.*—Here the prætor gives an action *quod jussu* against the master for the whole of the debt. (1.)

2. *The slave contracts as a magister navis or institor.*—The master sets the slave up as the master of a vessel, or the keeper of a shop, or the conductor of any business. The master thus authorises the slave to do all things necessary for his master. Here the prætor gives an *actio exercitoria* or *institoria* against the master for the whole of the debt. (2.)

3. *The slave trades with his peculium to the knowledge of the master.*—If debts are to be satisfied and the master is a creditor of the slave, the *peculium* and its proceeds are to be divided proportionately between him and the other creditors. The master makes the division, and if he does not make it fairly, any creditor prejudiced has an *actio tributoria* against him. (3.)

4. *The slave contracts without the direction or authorisation of the master.*—Here an action is given against the master, not for the whole debt, but, 1, so far as he has profited by what the slave has expended, and, 2, to the extent of the slave's *peculium*. The action is *de peculio et in rem verso*, and the condemnation is double; the judge first taking into account the profitable outlay, and then the *peculium*: but from the *peculium* is first deducted what the slave owes the master or any one in his power: unless, indeed, he owes it to a *vicarius*, who is part of the *peculium*, for deduction would then be useless. (4.)

The *actio exercitoria* or *institoria* must always be better for the creditor than that *de peculio et in rem verso*; for in the former action the master is bound for the whole debt. But the *actio tributoria* may be sometimes more favourable than that *de peculio*, sometimes less so to the creditor, and he must judge which he will bring. In the *actio tributoria* the creditor gains by there being no deduction made from the *peculium* of that which is due to the master. On the other hand, the *actio de peculio* affects the whole *peculium*, while the *actio tributoria* only affects that part of it engaged in trade. (5.)

What is said of the slave may be nearly, but not quite, said of the son in power. There are three points of difference to be noticed. 1. A father was bound to the extent of the son's *peculium* by the son's becoming a *fidejussor*. 2. The *filiusfamilias* could be sued civilly, and if he was condemned to pay, an *actio judicati* could be brought against the father to the extent of the son's *peculium*. There was no corresponding liability in either of these cases as to the slave. (6, note.) 3. By the *senatusconsultum Macedonianum*, prohibiting money to be lent to children or grandchildren of either sex *in potestate*, an action was refused for money so lent against the child, either while *in potestate* or become *sui juris*, and against the *paterfamilias*. If there was any doubt as to the facts, the action was permitted, and the *senatusconsultum* allowed on the ground of an exception. (7.)

The actions above mentioned, *quod jussu*, *exercitoria*, and *de peculio*, &c., were not properly separate actions. They were rather modifications of the prætorian actions under which, according to the nature of the contract, the master was sued. In process of time the prætors permitted not only prætorian actions, but condictions, to be brought against the master or father, where, had he contracted himself, a condiction would have been the appropriate remedy. (8.)

ii. Delicts of persons alieni juris.—A master could be sued under the prætorian or civil law, according to the origin of the *actio* (Tit. 8. pr.), for the delicts (*noxiæ*) of the slave, but he had the choice of paying the penalty, or giving up the wrongdoer (*noxa*) (1), to the persons injured (Tit. 8. pr., 2), before or after the *litis contestatio* (the action being *arbitraria*, i.e. to give the slave up or pay) (Tit. 8. pr.); and the slave, if given up, became the property of the person injured, unless he could procure money to pay the penalty, and then he became free, even if his new master would have preferred to keep him. (3.) The action always followed the person of the delinquent, and was brought against his master for the time being, or against the slave if he was manumitted; and so if a freeman became a slave after having committed a delict, the action was against his master. (5.) The master had no action against his slave for a delict, nor the slave any action against his master for injury, nor did any right of action arise subsequently, though the slave was transferred to another master or became free; and if a slave who had committed a delict became the property of the person injured, the right of action was extinguished. (6.) In old times children *in potestate* might be abandoned like slaves if they committed delicts. In later times this was considered barbarous. The son could be sued for the delict, and then an action *judicati* brought against the father to the extent of the son's *peculium*. (7.)

Pauperies.—By the Twelve Tables when an animal (*quadrupes*, extended by interpretation to all animals) of vicious habits did harm (*pauperies*), the owner might, instead of paying for the damage, deliver up the animal. (Tit. 9. pr.) If an animal of fierce nature, such as a bear, was kept where there was a public way, got loose, and did injury, then, if it was a freeman that was injured, the amount of the condemnation was left to the discretion of the judge; if a slave or anything else was injured, the condemnation was for double the damage done. (1.)

A delict might consist really of two offences, and then a separate action lay for each; or it might come under two heads of delict, and then, although an action lay under each head, the plaintiff could only recover in the second anything which under that action happened to be recoverable beyond what he had recovered in the first. (1, note.)

The discussion of the heads of actions is now interrupted to notice two points of procedure.

Representation in Suits.—Under the old law one man could not sue in the name of another. To this rule there were exceptions

in the cases of, 1, an *actio popularis;* 2, an *assertio libertatis;* 3, actions brought by tutors for their pupils. 4. The *lex Hostilia* permitted an *actio furti* to be brought in the names of (*a*) persons in captivity; (*b*) persons absent on the service of the State; (*c*) those in the *tutela* of such persons. (Tit. 10. pr.) Subsequently this rule was relaxed, and a person was allowed to appear in a suit; as (1) a *cognitor;* (2) a procurator. The *cognitor* had to be appointed formally and in the presence of the adversary. When sentence was given, the *actio judicati* lay against, not the cognitor, but the party to the suit. The procurator, whose introduction was of a later date, was appointed by simple mandate and without communication with the adversary, and originally acted in his own name, giving security that the party in the suit for whom he was acting would ratify what he did, and, if he was acting for the defendant, that the sentence should be carried out. A person desirous of representing another might be admitted to act as *negotiorum gestor*, although he could not show his mandate, if he gave security. The *actio judicati* was given for or against the procurator. At a later period, if the mandate was clearly proved, the procurator was considered to represent his principal; and this was extended to the case of a *negotiorum gestor*, who, acting at first without authority, afterwards showed that his principal ratified his action. The *actio judicati* was then given for or against the principal, and the procurator was in the position of the cognitor (Tit. 10. pr., note), only that the mode of his appointment was not necessarily formal or made in the presence of the adversary. (1.) The tutor or curator represented the pupil or adolescent, to, or against, whom the *actio judicati* was given, unless the tutor or curator had intervened unnecessarily, and then it was given to or against him. (2.)

Giving Security.—There were certain securities exacted from the parties to suits or their representatives. Considerable changes in this respect were made by Justinian. We have to consider, 1, whether the action was real or personal; 2, whether the party appeared personally or by a representative; 3, the law before and after Justinian. (Tit. 11. pr.)

i. *Before Justinian.* (*A*) *The action is in rem.*

(*a*) The plaintiff had to give no security. The procurator of the plaintiff, while still looked on as a simple mandatary, had to give security, *rem ratam dominum* (the party was termed *dominus litis*) *habiturum*, i.e. that the plaintiff would not bring another action in his own name. The *cognitor* and the procurator, when the procurator came to be looked on as a mere representative, had to give no security. The tutor or curator had to give security, *rem ratam dominum habiturum;* but this security was, as regards these persons, often dispensed with, when they were plaintiffs. (Tit. 11. pr.)

(*b*) The defendant had to give the *cautio judicatum solvi,* that he would either restore the thing or pay its value (*litis æstimatio*). If he did not give this security, the plaintiff, if willing to give it, was put by

an interdict in possession of the thing. The *judicatum solvi* contained three clauses: 1, *de re judicata,* that the thing should be given up or its value paid; 2, *de re defendenda,* that the defendant would properly defend the action, and appear and receive the sentence of the judge; 3, *de dolo malo,* that there should be no *dolus malus,* e.g. the thing should not be restored in a deteriorated condition. The defendant as well as his surety gave the *cautio judicatum solvi* in order that the plaintiff might have the easy remedy of suing on a stipulation. Naturally, as the defendant had to give this *cautio,* his representative had. (Tit. 11. pr.)

(*B*) *The action is in personam.*

(*a*) As to the plaintiff the rules are the same as when the action is *in rem.*

(*b*) The defendant, appearing personally, had not, unless in some exceptional cases, to give the *cautio judicatum solvi.* If he appeared by a *cognitor,* the defendant had to give the *judicatum solvi* on behalf of the *cognitor.* If he appeared by a procurator, the procurator, while still a mandatary, had himself to give the *judicatum solvi.* (1.)

ii. *Under Justinian.*—There was, under Justinian, no difference whether the action was real or personal. The plaintiff appearing personally had to give no security. The defendant appearing personally had not, in either a real or a personal action, to give the *judicatum solvi;* but, in both, he had to engage that he would appear and receive the sentence of the judge. If, however, he was a *vir illustris,* it was enough that he engaged to do this by oath, *cautio juratoria,* or even by a simple promise. (2.)

If the plaintiff appeared by a procurator, whose mandate was registered officially, or given by the plaintiff personally before the judge, the procurator had to give no security. If the plaintiff appeared by a procurator not so appointed, the procurator had to give security *rem ratam dominum habiturum;* and this rule applied to tutors and curators. (3.)

If the defendant appeared by a procurator, whom he appointed personally before the judge, the procurator had not to give security, but the defendant had to bind himself, on behalf of the procurator, to all the three clauses of the *judicatum solvi.* If he appeared by a procurator not appointed before the judge, both the procurator and the defendant, as *fidejussor* of the procurator, had to give the *judicatum solvi,* with all its three clauses made binding on each. The defendant further, whether the procurator was appointed before the judge or not, had, as a guarantee for the *judicatum solvi,* to subject all his property to a hypothec. This obligation passed to his heirs, and he had also to give security that he himself would appear personally to receive the sentence of the judge. (4.)

If the defendant did not appear, but some one volunteered to defend the action for him, this was allowed, if this voluntary *defensor* gave security *judicatum solvi.* (5.)

The subject of actions is resumed, and concluded, by noticing two more distinctions.

1. ACTIONES PERPETUÆ, TEMPORALES.—Actions differed in the time during which they could be brought. Actions arising from the law, or a *senatusconsultum*, or constitutions, were *perpetuæ*, i.e. could be brought without limit of time, until Theodosius II. imposed a general limit of thirty years on all actions real or personal, a limit subsequently, in some few exceptional instances, as in that of actions on hypothec, extended to forty years. Prætorian actions were annual, i.e. must be brought before the close of an *annus utilis* from the time when they could first have been brought. To this, however, there were so many exceptions that we may say that prætorian actions also were *perpetuæ*, except when they were penal (the *actio furti manifesti* being, however, perpetual), or when they were for the value of the thing, but were in opposition to, not in extension of, the civil law, like the *actio in rem rescissoria*. (Tit. 12. pr.)

2. ACTIONS PASSING TO OR AGAINST THE HEIR.—It is only penal actions that are to be noticed, as all other actions passed to and against the heir. Penal actions do not pass against the heirs of the wrongdoer, except to make them account for any benefit they may have derived from the delict. But penal actions do pass to the heir of the person injured, except in such cases as that of *injuriarum* (personal insult). After the *litis contestatio*, however, all penal actions pass both to and against the heir. (1.)

Finally, it may be remarked that all actions are *absolutoriæ*, that is, if, after the proceedings have commenced, the *formula* has been given, or an equivalent stage reached, the defendant satisfies the plaintiff, the judge must absolve the defendant, and need not go on in any case to give sentence. (2.)

EXCEPTIONS.—If the plaintiff's action is well founded, but there is any reason why it is unjust that it should be effective against the defendant, he can avoid its effect by the introduction of an exception, allowed by some particular law, or by the prætor (Tit. 13. 7), into the formula while the formulary system lasted. In actions *bonæ fidei* it was not necessary that the exception should be pleaded, as the *judex* took cognisance of all matters that would form the groundwork of an exception. In other actions, *actiones stricti juris, in factum, arbitrariæ*, including actions *in rem* (Tit. 13. 4), and penal, the exception had to be pleaded, and the defendant had to prove it, just as the plaintiff had to prove his case. Under Justinian an exception meant any defence other than a denial of the subsistence of the alleged right of action. (Tit. 13. pr., note.)

The following instances of exceptions are given, and are all supposed to be pleaded to an action *ex stipulatu*. 1. *Error*, a mistake not as to the subject of the stipulation, but as to some fact which was not known to the defendant, and which, if known, would have prevented his promising; 2, *metus causa*, a general exception, fear caused by

any one; 3, *doli mali*, the bad faith of the plaintiff himself, either when the obligation was formed or subsequently; 4, *in factum*, that is, the prætor merely stated a circumstance which, if established, was to bar the action of such exceptions. (1.) The following examples of exceptions *in factum* are given:—(a) *Pecuniæ non numeratæ*, when a person agreeing to lend money, and stipulating for its repayment, does not really pay it. Here the plaintiff had to prove that he had really paid the money, but the exception could only be pleaded within five years before Justinian, and two years under Justinian (2); (b) *pacti conventi*, when the plaintiff has agreed not to demand payment, but the contract, as being *verbis* or *re*, could still be sued on (3); (c) *jurisjurandi*, when, the plaintiff having challenged the defendant, and the defendant having denied his liability, the plaintiff went on with the action. (4.) The *exceptio doli mali* covered all cases of exceptions *in factum*, and might be pleaded in lieu of them, except that, as its being found true carried infamy with it, the magistrate would not allow it to be employed when the plaintiff was a patron or ascendant (1, note); 5, *rei judicatæ*, that judgment had already been given in the matter, it being necessary that there should have been in the former action the same subject matter of litigation, the same quantity, the same right, the same ground of action, the same parties. If the former action was a *judicium legitimum in personam* with an *intentio juris civilis*, the right of action was extinguished, and no exception was necessary. If it was a *judicium legitimum in rem*, or *in factum*, or was a *judicium imperio continens*, the right of action not being extinguished by novation, the *exceptio rei judicatæ* was necessary to stop the second action. Under Justinian the exception was in every case necessary. Gaius also mentions the *exceptio rei in judicium deductæ*, i.e., that the case was already before the tribunal, the time within which sentence was obliged to be given not having elapsed. (5, note.)

Exceptiones perpetuæ, temporariæ, peremptoriæ, dilatoriæ.—Exceptions were either *perpetuæ*, i.e. could be used by the defendant without restriction of time, or *temporariæ*, i.e. were subject to such a restriction; and they were *peremptoriæ*, i.e. put an end to the litigation, or *dilatoriæ*, i.e. only stopped it for a time. (8.) Perpetual exceptions were always peremptory; as instances are given the exceptions *doli mali*, *metus causa*, and *pacti conventi*, if the agreement has been that no demand shall be at any time made. Temporary exceptions were always dilatory. As an instance is given that of *pacti conventi*, when the agreement has been that no demand shall be made during a given time, e.g. five years. If he sued before the five years had elapsed, the plaintiff might be repelled by an *exceptio*. Previously, if the plaintiff was thus repelled, he was guilty of *plus-petitio* in regard of time, and could take no further proceedings. Under a constitution of Zeno, the plaintiff suing prematurely had to wait twice as long as he ought to have waited, and he must reimburse the defendant for all losses sustained through the demand being premature. (10.) As

another instance, Gaius gives the *exceptio litis dividuæ* given to repel a plaintiff suing under the same prætorship for another part of a thing (10, note), for one part of which he had already sued. Some dilatory exceptions have regard, not to the thing sued for, but to the person, as when objection was taken to a procurator, that he or she was a soldier or a woman, as neither could act as procurator, or that he was an improper person, as having been stamped with infamy; but Justinian did away with exceptions on this last ground. (11.)

Prescriptions.—Gaius notices prescriptions after noticing exceptions, i.e. limitations of the action entered on behalf of the plaintiff, as, for example, to confine the action to so much of the plaintiff's right as had produced an existing liability, or for the defendant, as the *præscriptio longi temporis;* but prescriptions for the defendant had already, in the time of Gaius, been classed among exceptions. (11, note.)

Replications.—There might be an exception to an exception, i.e. there might be grounds on which the exception, although founded on fact, could not be allowed to operate, as if an agreement had been made not to sue, and then this agreement had been rescinded. In this case a replication that the agreement had been rescinded would be inserted, to do away with the effect of the *exceptio pacti conventi* (Tit. 14. pr.), and so there might be a *duplicatio* (1) to a *replicatio*, and there might be even, if necessary, a *triplicatio.* (2.)

Exceptions may be divided into *rei cohærentes*, affecting the rights to claim, as the *exceptio doli mali*, or the *exceptio pacti conventi*, when it was a general pact not to sue; and *personæ cohærentes*, protecting the debtor personally, as the *exceptio pacti conventi*, when it was a pact not to sue the particular debtor. As a general rule, the *fidejussores* of the defendant could use all the exceptions the defendant could use; but this was not universally true of *exceptiones cohærentes personæ.* For a debtor who had made a *cessio bonorum* was protected from the actions of his creditors by the exception *nisi cesserit bonis*, which was *personæ cohærens;* but his *fidejussores* could not use this exception, as the very object of their suretyship was to guard against the debtor not being able to pay. (4, note.)

Interdicts.—We now come to what became a preliminary step under the prætorian system to the commencement of one kind of actions, those that regarded possession and *quasi*-possession, i.e. the possession of servitudes. (Tit. 15. pr.) The prætor issued an interdict or decree regulating possession, and then, if the facts on which the applicant relied were contested by the other party, the prætor threw the decree into the shape of an action to be decided according to the real facts. Probably the prætor interfered by interdict to protect and determine possession before he gave actions to try the right to possession, and not improbably the interests arising out of the possession of the *ager publicus* may have first suggested the prætorian intervention by interdicts. Gradually the action was regarded as the point of real importance, although, as the granting of the action depended on the rules as to interdicts, the study

of these rules preserved its importance. By the time of Justinian interdicts had become wholly obsolete, and all questions as to possession were determined by actions without recourse being had to the preliminary step of interdicts.

The interdict was issued by the magisterial authority of the prætor, and interdicts always bore traces of their origin in two ways. 1. First issued as special edicts to meet special cases, they were afterwards issued under standing regulations incorporated in the prætorian edict, but they were always, perhaps, theoretically grounded on infractions of public order, and the time in which some possessory interdicts had to be applied for (one year) connects them with the law of delicts. 2. They were all, directly or indirectly, connected with possession, with keeping things as they ought to be. (Tit. 15. pr., note.)

They were of three main kinds:—(a) Prohibitory, (b) Restitutory, and (c) Exhibitory. By the first the prætor ordered something not to be done which infringed the use of something public, as a road, or of something which, for the sake of public order, he protected, as the right of possession of individuals. By the second the prætor ordered things to be put into the state they were in before something wrong had been done, as, e.g., buildings to be demolished, which impeded the use of a public river or its banks; or possession to be given or restored to the right person. By the third the prætor ordered the thing or person, if it was a person that formed the subject of contest, to be produced by the person who had got hold of it, so that the claimant might not be prejudiced by the thing being concealed. (1.)

Gaius understood *interdicere* as 'to prohibit,' and says that prohibitory interdicts alone ought strictly to be called interdicts, and interdicts of the other kinds ought to be called *decreta*. Justinian says, all may be called interdicts, as he considers *interdicere* to mean to pronounce between two parties, *inter duos*. (Tit. 15. pr., note.)

If the interdict was prohibitory, the parties in the time of Gaius bound themselves by a wager, in a sum to be paid by the losing party in the action. In the case of interdicts restitutory or exhibitory, this had become obsolete; instead, an *actio arbitraria* was given, and the *judex* issued his preliminary order against the party concerned, and, in the event of its not being obeyed, gave a *condemnatio quanti ea res erat*. (8, note.)

Those interdicts, which distinctly referred to the possessory rights of private persons, were given to acquire, to retain, or to recover possession, those to retain possession being prohibitory, and those to acquire or to restore being restitutory. (2.)

1. *Adipiscendæ possessionis causa.*—The chief interdict under this head was that known as *quorum bonorum*, given to secure the possession of an inheritance as a *universitas* to those whom the prætor, contrary to the rules of civil law, treated as having a right to an inheritance. It was given against two classes of persons: (a) persons possessing *pro herede*, i.e. thinking themselves to be the real heirs; (b) persons pos-

sessing *pro possessore* (*prœdones*), i.e. persons merely possessing without any claim of title. It was given against both classes, even if the term of usucapion had run in their favour, and also against them if they had through their own *dolus malus* ceased to possess. (3.)

This interdict was never given except to a person getting possession for the first time, so that *restituas*, the word in the formula, must be used (as well as the term restitutory applied to interdicts) in a very wide sense. (3.)

Under this head was also given the *interdictum Salvianum*, by which an owner of a rural estate got possession of the goods of the occupier (and probably even if they had passed into third hands) in case of non-payment of rent. This interdict was a step historically to the *actio Serviana.* (3.)

2. *Retinendœ possessionis causa.*—The two main interdicts under this head were those *uti possidetis* and *utrubi possidetis*, the former applying to immoveables and the latter to moveables. The object of these interdicts was to determine which of two disputants as to ownership was entitled to the possession, and to have this point determined in his favour was of great advantage to a disputant, as he remained in possession if his adversary failed to show he was the real owner. The interdict *uti possidetis* had to be applied for within a year after the possession had been in any way threatened. Previously to Justinian the interdict *utrubi possidetis* was given to that disputant who himself, or by any one through whom he claimed, had been in possession during the greater part of the preceding year. Under Justinian possession was confirmed to the person in possession at the time of the *litis contestatio*, provided (which had always been a condition as to both interdicts) that he had not obtained his possession as against his adversary *vi*, *clam*, or *precario*, the last term meaning by permission, and at the will, of the adversary. (4.)

Only persons having *civilis possessio* or *naturalis possessio*, with the *animus* of ownership, could obtain these interdicts. Persons simply *in possessione*, detaining the thing without the *animus possidendi*, could not obtain them, but the person on behalf of whom such persons were *in possessione*, possessed through them: thus the owner possessed through the tenant, or the depositor through the depositary, or the lender through the borrower. Without the *animus* there can be no interdictory possession, but if a person has the *animus* he need not always have the corporeal detention, as, for example, if a man uses in the season an alpine pasture and leaves it when the season is over with the intention of returning to it, he still possesses it. (5.)

3. *Reciperandœ possessionis causa.*—The main interdict under this head was that *unde vi.* Here, there having been an illegal use of violence, the wrongdoer had to restore possession, although the person to whom he restored it had himself got it from him *vi*, *clam*, or *precario*. In the days of the Republic there had been a distinction according to the kind of violence used. If the violence had been ordinary (*quotidiana*),

the possession would only be restored if it had not been obtained by the applicant *vi*, *clam*, or *precario*, and the application must be made within a year. If the violence had been *armata*, the possession was restored, although obtained *vi*, *clam*, or *precario*, and there was no limit as to the time for asking for the interdict. This distinction, however, had become obsolete before the time when the formula of the interdict was shaped as it is found in the Digest.

The interdict *unde vi* only applied to immoveables. But by a constitution of A.D. 389 it was provided that any one who seized on anything with violence should lose the ownership if it was his, or give it up, and also pay its value, if it was not. This constitution applied to moveables as well as immoveables. (6.)

Previously to this constitution, possession of moveables had been recovered by the interdict *utrubi*, and both this and the interdict *uti possidetis* may be looked on as means of recovering as well as of retaining possession. But the employment of the interdict *unde vi* had, as compared with that *uti possidetis*, the following advantages: (*a*) it could be used when a third person was in possession; (*b*) it gave the *fructus* from the time of ejectment, not that of the commencement of proceedings; (*c*) it was given although the possession had been obtained as against the adversary *vi*, *clam*, or *precario;* (*d*) it included moveables on the estate. (6, note.)

Simple, double Interdicts.—The interdicts *uti possidetis* and *utrubi* may be said to be double, i.e. each party is at once plaintiff and defendant, as opposed to other interdicts, where one party claims and the other defends. (7.)

Two points with regard to the proceedings in actions remain to be noticed: 1, the checks on reckless litigation; 2, the duty of the judge.

1. CHECKS ON RECKLESS LITIGATION.—A summary is given under Tit. 16. pr. of the checks in the time of Gaius on reckless bringing or defending actions. Under Justinian, both parties were obliged to swear, the plaintiff *de calumnia*, that he was not bringing an action vexatiously or without cause, the defendant that it was from a belief in the justness of his cause that he resisted the demand of the plaintiff; and the advocates of both parties had also to take an oath. The plaintiff was liable to pay damages and costs. (Tit. 16. 1.)

The defendant was restrained (*a*) by the action sometimes being *in duplum* (the Institutes add *in triplum*, but no instances are known) when there was a denial on the part of the defendant, as in cases of *damni injuriæ* and legacies left to holy places; (*b*) by the action being *ab initio* for more than the single value, as in the case of theft (1); (*c*) by infamy, which attends condemnation in an action *tutelæ*, *mandati*, or *depositi* if direct, and *pro socio* (which is direct for both parties), and which attends not only *condemnatio*, but an agreement to commit the offence, in actions *furti*, *vi bonorum raptorum*, *injuriarum*, and *de dolo*. (2.)

The first step in an action was the *vocatio in jus*, the summons to the defendant to appear before the magistrate. Children, however, cannot summon ascendants, nor freedmen patrons or the children or ascendants of patrons, without having first received the permission of the prætor. If they act without this permission, they are liable to a fine of fifty *solidi.* (3.)

2. THE OFFICE OF THE JUDGE.—The Institutes first lay down the general duty of the judge, which is to judge according to the law, the constitutions, and customary usage. (Tit. 17. pr.) If the judge gave a sentence wrong on the face of it, or fixed the condemnation below what the prætor had fixed it, the sentence was void and no appeal was necessary. If the judge was supposed to be wrong otherwise, notice of appeal had to be given within two days (or, if the defendant had appeared by a procurator, three days), enlarged by Justinian to ten days. The Emperor was the final judge of appeal, but Hadrian made the decisions of the Senate final, and Constantine those of the prætorian præfect.

Secondly, the Institutes point out what judgment ought to be given in certain actions:—

(*a*) In a noxal action the judge ought to state the condemnation by ordering a sum to be paid, or the *noxa* abandoned. (1.)

(*b*) In a real action, if he determines against the claimant, he ought to absolve the possessor; if against the possessor, he ought to order the thing and its fruits to be given up, and, after the time of Hadrian, all the fruits consumed had to be accounted for, whether the possession was *bona fide* or *mala fide*, if the thing possessed was an inheritance. Before Hadrian as to inheritance, and before and after his time as to single objects, the rule was that a *bona fide* possessor had to account for fruits after the bringing of the action, the *mala fide* possessor for all. If the possessor showed that he could not give up the possession at once, he obtained a delay on giving security to give up within a time allowed him. (2, and note.)

(*c*) In an action *ad exhibendum* the defendant must exhibit the thing, his title to it, and everything derived from it, as e.g. the fruits, since the bringing of the action; nor will usucapion accomplished subsequently avail him. If he states that he cannot exhibit at once, he can obtain a delay on giving security, but if he neither exhibits nor gives security, he is to be condemned in an amount representing the interest of the plaintiff in having the thing exhibited at once. (3.)

(*d, e, f*) In the actions *familiæ erciscundæ*, *communi dividundo*, and *finium regundorum*, the judge ought, if he gives to one more than to another, and one thus receives more than another, to make this favoured person pay a pecuniary equivalent. (4, 5, 6.) In the action *finium regundorum*, a person ought to be condemned who has destroyed boundary marks, or opposed, in defiance of the judge's order, the measurement of the land. (6.)

In all these three actions anything adjudged becomes at once the property of the person to whom it is adjudged. (7.)

Crimes.—The subject of public prosecutions being altogether outside the general subject of the Institutes, which treat of private law (Tit. 18. pr.), may be omitted here. A sketch of Roman criminal law is given in the last section of the Introduction.

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